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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 87

UNITED STATES OF AMERICA, PETITIONER

v.

LELORD KORDEL AND ALFRED FELDTEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The initial opinion of the court of appeals (App. 353–360) is not reported. The opinion of the court of appeals on rehearing (App. 362–370) is reported at 407 F. 2d 570.

JURISDICTION

The initial judgment of the court of appeals (App. 353–360) was entered on July 26, 1968, and was modified on petition for rehearing on February 20, 1969 (App. 361–370). Mr. Justice Stewart extended the government's time for filing a petition for a writ of certiorari to April 21, 1969. The petition was filed on that date and was granted on June 2, 1969. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a prosecution for violating the food and drug laws, respondents' privilege against self-incrimination or other Fifth Amendment rights were violated by the fact that the government, in a prior civil proceeding to condemn the drugs owned by the corporation of which respondents were officers, had directed interrogatories to the corporation pursuant to Rule 33, F.R. Civ. P., with respect to respondents' activities in connection with the drugs.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, respondents and their corporate employer, Detroit Vital Foods, Inc., were convicted on five counts of an indictment charging them with introducing into interstate commerce certain misbranded drugs (Frutex wafers, Lecigen granules, Aminex and Nutri-Time tablets) and with performing acts which resulted in the misbranding of the drug Korleen while it was being held for sale after shipment in interstate commerce (21 U.S.C. 331(a), (k)). On January 19, 1966, respondent Kordel was sentenced to imprisonment for two years, subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2), and was fined $10,000; respondent Feldten was sentenced to imprisonment for one year, suspended to thirty days with three years' probation, and was fined $2,000; and the corporation

was fined $5,000 and directed to pay the costs of prosecution under 28 U.S.C. 1918.[1]

Detroit Vital Foods, Inc., is a Michigan corporation with its headquarters in Detroit. Respondent Kordel was its president and respondent Feldten its treasurer. Kordel was the author of numerous books and leaflets promoting the products of Detroit Vital Foods, Inc. As the court of appeals found, the evidence showed that during the years 1959–1961 Kordel traveled across the country delivering lectures in various cities which were advertised and open to the public. The books and lectures were discussions of how various physical ailments could be alleviated by the intake of certain foods and food elements. The best sources of these foods and food elements, it was said, were the products offered for sale by respondents. The company's products were sold at booths in or near the lecture halls and were also available in health food stores generally. Feldten made no speeches but acted as Kordel's assistant. He sold the products at lectures and took orders for products to be shipped from Detroit (App. 362–363).

The essence of the criminal charges against respondents was that, as to some of the products, certain books and leaflets written by Kordel constituted part of the labeling and contained false and misleading statements, and that, as to all counts on

[1] Respondent Feldten and the corporation were found guilty of misdemeanors as first offenders. Respondent Kordel was found guilty of felonies by virtue of his prior conviction for violation of Section 331. See 21 U.S.C. 333; and see, affirming the previous conviction, *Kordel* v. *United States*, 335 U.S. 345.

which respondents were convicted,[2] the products (claimed by defendants to be merely food supplements) were in fact drugs intended by defendants to be used for the prevention and treatment of various diseases and conditions (see App. 363–364) and the labeling for them was deficient under 21 U.S.C. 352(*f*) in that it failed to set forth adequate directions for use (*e.g.*, the dosage, frequency and duration of administration of each drug and the conditions for which its use was intended).[3] The government proved Kordel's representations about the drugs principally by introducing tape recordings of his public lectures.

1. The indictment in this case was returned in August 1963. On June 9, 1960, the government had filed a libel[4] under 21 U.S.C. 334 seeking to condemn quantities of Korleen tablets and Frutex wafers on the ground that they had been misbranded while held for sale after shipment in interstate commerce. The corporate claimant, Detroit Vital Foods, Inc., filed an answer denying the material allegations of the libel (App. 302–303). During the course of the civil suit, which terminated in a consent decree of condemnation,[5] the government served interrogatories upon the

[2] Respondents were convicted on counts 4, 8, 9, 10, and 11 (App. 3) of the original twelve-count indictment. Six of the twelve counts were dismissed prior to trial. A seventh count was dismissed during the trial.

[3] An example of an almost identical prosecution is *Nature Food Centres, Inc.* v. *United States*, 310 F. 2d 67 (C.A. 1), certiorari denied, 371 U.S. 968.

[4] The libel was amended on January 23, 1961.

[5] The claimant reserved the right to appeal the jurisdictional question pertaining to Korleen tablets, but the requirements of interstate commerce in their production were found

claimant pursuant to Rule 33, F.R. Civ. P. The interrogatories (set forth at App. 304–328) were filed on January 9, 1961, and April 10, 1961, and sought detailed information, *inter alia,* about the labeling, testing, manufacture and composition of Korleen and Frutex and about respondent Kordel's oral representations concerning the efficacy of these drugs made during the public lectures he gave at Detroit between March 29 and April 8, 1960.[6] In the course of the civil action the claimant also served extensive interrogatories upon the government, which were answered in January 1961 (see App. 337–338).

In April 1961 Detroit Vital Foods, Inc., moved to stay the libel action on the ground that criminal prosecution was being considered by the government. The motion (App. 329–336) stated that in late January 1961, shortly after service of the initial interrogatories by the government, the company had received a notice of hearing under 21 U.S.C. 335,[7] indicating that

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to have been met. See *United States* v. *Detroit Vital Foods, Inc.*, 330 F. 2d 78 (C.A. 6), certiorari denied, 379 U.S. 832; see, also, *United States* v. *39 Cases* * * * *Mich. Brand Korleen Tablets*, 192 F. Supp. 51 (E.D.Mich.).

[6] One of the counts of the instant indictment on which respondents were convicted (Count 4) was based on this lecture-promotion. The other counts were based on lecture-promotions of March 7–17, 1960, given at New York, and April 4–14, 1961, given at Detroit.

[7] 21 U.S.C. 335 provides that: "Before any violation of this chapter is reported by the Secretary to any United States Attorney for institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views, either orally or in writing, with regard to such contemplated proceeding." Two additional notices of hearing, concerning pos-

criminal prosecution of the corporation and respondents was contemplated, in part for the same conduct that was the subject of the libel. The motion asked that, pursuant to the court's discretionary power,[*] the claimant's time to respond to the government's interrogatories be extended until after final disposition of the criminal case, since responses to the interrogatories would disclose the basis of the claimant's defense in the criminal case. On June 21, 1961, the district judge denied the motion for a stay, on the ground that there was no certainty when or whether a criminal prosecution would be brought, and that the corporation was not prejudiced by being required to answer the interrogatories, since the government would in any event obtain information pertinent to a criminal case from the trial of the libel action itself (see opinion of Judge Levin, at App. 337-339). The court ordered claimant to answer the interrogatories within thirty days or file specific objections thereto within twenty days.

On September 5, 1961, claimant filed answers to some of the interrogatories. Respondent Feldten subscribed to the answers as vice president of the claimant and stated that the answers were true to the best of his knowledge and belief, but that not all of the answers were known to him personally (App. 345-

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sible violations involving the other two (later) lecture-promotions underlying the present prosecution, were issued to the company prior to the reporting of the matter to the United States Attorney in June 1962. Hearings on these Section 335 notices were held in New York (see App. 156–158, 205–207).

[*] Reliance on the Fifth Amendment privilege against self-incrimination was expressly eschewed.

348). The claimant filed objections to several unanswered interrogatories on September 14, 1961 (App. 340-343). After a pre-trial conference in May 1962, the trial judge sustained the objections to certain of the interrogatories and indicated that the government should review the remaining unanswered interrogatories with a view to their possible withdrawal, since the judge did not regard many of them as fundamental to the issues. On June 14, 1962, the government advised the district court that it was withdrawing about a dozen of the interrogatories,[9] but that it was insisting on certain others. The government also pointed out that, although nine months had passed, claimant had not yet furnished information in response to several interrogatories as to which the information had been promised "shortly" in claimant's initial answers to the interrogatories. On September 13, 1962, the district judge overruled the objections to each of the interrogatories upon which the government had insisted[10] and directed claimant to respond to the interrogatories as to which it had promised that information would be forthcoming (App. 344). On September 24, 1962, claimant, by re-

[9] Withdrawn were orginal interrogatories numbered 16(b), 16(c), 27, 32, 34, 37, 44, 50, and 59, and supplemental interrogatories numbered 14, 16, 19, and 20.

[10] These were original interrogatories numbered 18, 20-23, 26, 30, 35, 52, 57, and 60. They concerned requests for admissions (1) that respondent Kordel had made certain representations in his lectures, (2) that the products did not have the curative qualities ascribed to them, and (3) that the labeling of Korleen was deficient.

spondent Feldten as before, submitted additional answers to the interrogatories in compliance with the judge's order (App. 349–352).

Claimant submitted, in all, some eight or nine pages of answers to the interrogatories. Claimant alleged "no knowledge" of the facts as to whether certain leaflets containing representations about the products Korleen and Frutex were distributed to the public at respondent Kordel's lectures. It denied that Korleen tablets and Frutex were intended, or were represented by Kordel at the lectures, to be an adequate cure for various diseases, claiming instead that these products were sold only as "food supplements" (App. 346, 349). At no time did claimant or either respondent lodge an objection to any interrogatory on Fifth Amendment grounds. Thereafter the consent decree which terminated the libel action (save for the jurisdictional issue) was entered on November 29, 1962.

2. The Food and Drug Administration referred the matter to the Department of Justice with a recommendation for prosecution on June 13, 1962. An indictment was returned against respondents and the corporation in August 1963. In March 1965, they moved in the criminal case to suppress "any evidence or leads therefrom obtained by the Federal Government in compulsory discovery proceedings instituted by the Government" in the libel action (App. 46). They contended that the use of such evidence and leads constituted "an unconstitutional exercise of inquisitorial authority, and is violative of civilized standards of procedures in the administration of criminal justice" (*ibid.*). In the alternative, the motion requested a

hearing to determine the government's good faith and motive in commencing the civil action and serving the interrogatories. The district court granted the request for a hearing (App. 52–57).

At the three-day hearing which followed, the Assistant United States Attorney and the Detroit and Washington, D.C., representatives of the Food and Drug Administration who were in charge of the civil and criminal cases involved herein testified. The record of this hearing showed, as the district court recognized, that, at the time the civil case was filed, the Food and Drug Administration had evidence to establish *all* of the elements of the criminal violations (App. 154–155, 208–210, 212, 232, 287). The principal purpose of submitting the interrogatories was to obtain admissions to all or many of the facts as to which proof at trial would otherwise be required and thus to narrow the issues in the civil suit or to lay the foundation for a motion for summary judgment. An additional purpose was to demonstrate to the claimant the insubstantiality of its case and thus possibly precipitate a consent decree (App. 224, 249–250). One witness further testified that the civil action to seize the drugs had to be commenced "promptly" (and thus could not await a determination by the agency whether to recommend criminal proceedings) because otherwise the merchandise would be distributed, and the harm to the public accomplished (App. 227). Prior to the decision to recommend criminal prosecution, information pertaining to both the civil and possible criminal cases was kept in a single agency file and both cases were under the

overall supervision of a single representative, Mr. Goodrich, General Counsel of the Food and Drug Administration. No decision with regard to recommending criminal prosecution had been made by the agency when the civil case was commenced, or when the interrogatories were filed (App. 176–177, 188, 190–192, 236). The issuance of the notice of hearing in late January 1961 (after the initial interrogatories were filed) announcing that the Food and Drug Administration was "considering" criminal prosecution of respondents and the corporation for their activities in connection with the drugs involved in the civil suit did not reflect a prior decision to recommend such prosecution, and it was testified that less than ten percent of cases in which such notices of hearing are sent out by the Food and Drug Administration ever result in the bringing of formal criminal charges against the recipient (App. 223–225). Mr. Randolph of the Food and Drug Administration first recommended to its General Counsel that the case be sent to the Department of Justice with a recommendation for criminal prosecution on August 31, 1961, *before* the corporation had filed its initial answers to the government's interrogatories. Mr. Randolph was then aware of Judge Levin's ruling denying claimant's motion to postpone the time for responding to the interrogatories, but he testified that he "knew that irrespective of the answers, it would have no influence on [his] recommendation for prosecution" (App. 229–230, 236).

At the conclusion of the hearing, the district court found that the governmental decisions to commence

the civil action and to submit the interrogatories to the claimant had been made in good faith and that there was then no certainty that a criminal prosecution would be brought. Accordingly, the court denied the motion to suppress on the authority of *Abel* v. *United States*, 362 U.S. 217 (App. 285–288).

3. On July 26, 1968, the court of appeals for the Sixth Circuit reversed the convictions of all the defendants on the ground that they had been denied the protection afforded by the Fifth Amendment. The government filed a petition for rehearing which was granted. On February 20, 1969, the court of appeals modified its opinion so as to affirm the conviction of the corporate defendant,[11] but adhered to its judgment reversing the convictions of respondents Kordel and Feldten.

Although none of the answers to the interrogatories had been introduced into evidence in the criminal case, the court of appeals found that the government had not proved that information and leads obtained thereby had not been utilized in securing the indictment or obtaining evidence admitted at the trial (App. 368–369). The court held that the good faith of the government in using the interrogatories was irrelevant, since, by requiring the corporation to answer the interrogatories, the government had compelled the individual respondents to incriminate themselves. The court purported to recognize that the privilege against self-

[11] This Court denied the corporation's petition for a writ of certiorari (No. 1285, O.T., 1968) from that judgment on June 2, 1969, the day on which it granted the government's petition for a writ of certiorari as to the respondents herein.

incrimination is available only to natural persons and not to a corporation. It held, nevertheless, that the Fifth Amendment privilege was available to both Kordel and Feldten even though neither had interposed any claim to the seized drugs, neither was a party to the civil action, and Kordel had supplied no answers to the interrogatories (App. 365–370). The court held in the alternative with respect to Kordel that Feldten's answers to the interrogatories, which it characterized as "admissions," violated the rule of *Bruton* v. *United States,* 391 U.S. 123 (App. 370).

SUMMARY OF ARGUMENT

I

The court of appeals erred in reversing respondents' convictions on the ground that their privilege against self-incrimination had been violated by the interrogatories addressed to the corporation of which they were officers—even though neither respondent had been a party to the civil action in which the interrogatories were used, neither had interposed a claim to the drug, neither had claimed the privilege against self-incrimination when respondent Feldten answered the interrogatories on behalf of the corporation, and neither made a showing that the answers to the interrogatories led to any evidence used in the criminal case. The court failed to give adequate consideration to the law surrounding the use of interrogatories and to the legal consequences that flow from doing business in corporate form.

Respondents were under no compulsion to provide incriminating information in response to the inter-

rogatories. Under Rule 33, F.R. Civ. P., a person who answers interrogatories on behalf of a corporation may invoke his privilege against self-incrimination as to any or all of the interrogatories. The sole duty imposed under Rule 33 is upon the party served with interrogatories to "furnish such information as is available to the party." Thus, the only person compelled to provide information in response to the interrogatories was the corporation, which had no privilege against self-incrimination and could not invoke that of any other person. Neither respondent Feldten, who answered the interrogatories, nor respondent Kordel, who did not, ever invoked the privilege against self-incrimination as to any interrogatory. Nor did either of them attempt to show that no other officer, employee or agent of the corporation could answer the interrogatories.

There was no compulsion on respondents stemming from the fact that, if the corporation failed to answer the interrogatories, it might be liable to a default judgment. The drugs which were at stake in the condemnation suit were the property of the corporation, which was the sole claimant in the civil proceeding. Respondents asserted no personal property interest in the drugs. Whatever respondents' financial relationship to the corporation, they could not, under this Court's decisions, utilize the corporate form of doing business and still claim an individual interest in its property for the purpose of invoking the Fifth Amendment privilege against self-incrimination.

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II

Although couched in terms of the privilege against self-incrimination, the opinion below suggests more generally that it was basically unfair for the government to insist on answers to interrogatories in the civil proceeding at a time when the possibility of bringing a criminal prosecution against respondents and the corporation based upon the same activities was under consideration. We do not deny the need for care in situations where government agencies, in fulfilling their statutory responsibilities to safeguard the public, determine that both civil and criminal remedies are appropriate against a corporation or individuals. We believe, however, that their ability to protect the public would be unjustifiably hampered by the *per se* rule applied by the court below, which would mean that the mere fact that the government proceeds with a civil suit against a corporation and uses the normal processes of civil discovery therein would automatically give the individual officers of the corporation immunity from prosecution for their related conduct unless the government could affirmatively show that no information obtained in the civil action led in any way to evidence in the criminal case.

There was no unfairness in this case. The civil action was necessary to protect the public from distribution of the mislabeled drugs, and it was important to bring the suit promptly to judgment so that, in accordance with 21 U.S.C. 334, the Food and Drug Administration would be able to proceed by multiple seizures to prevent the corporation from

marketing additional quantities of the mislabeled drugs. The interrogatories were a valid device to expedite the civil suit, by seeking admissions which would prepare the groundwork for a motion for summary judgment. As the district court found, the civil action was commenced, and the interrogatories were submitted, in entire good faith. This case does not present the situation where the government has attempted to use a proceeding solely as a means to obtain evidence for a different action.

There was, moreover, no concealment of the government's intention to prosecute in this case. The Food and Drug Administration, shortly after service of the initial interrogatories, sent the corporation a notice, pursuant to 21 U.S.C. 335, that criminal prosecution of respondents and the corporation was being considered in relation to the activities at issue in the condemnation suit. Respondents were thus in a position to judge whether answers to the interrogatories might tend to incriminate them. Moreover, it is clear that the government was not seeking to get incriminating information as to respondents through the interrogatories, which were not introduced in the criminal trial. Prior to service of the interrogatories, the government already had evidence to establish all of the elements of the criminal violations. The interrogatories were intended solely to get the corporation to admit certain of those facts so that the government could move for summary judgment, or negotiate a consent decree, in the civil suit.

The court of appeals was, therefore, unwarranted in reversing respondents' convictions.

ARGUMENT

The precise holding of the court below is that respondents' individual privilege against self-incrimination was violated because the corporation was required to answer interrogatories in a civil proceeding for forfeiture of the drugs alleged to have been mislabeled. We address ourselves first to this ruling, arguing that the individual respondents were in no sense compelled to incriminate themselves by virtue of the interrogatories, and that their Fifth Amendment privilege against compulsory self-incrimination was therefore not violated.

There is, however, another, not fully articulated, rationale that arguably underlies the decision below. The court of appeals—notwithstanding its express reliance on the privilege against self-incrimination and its consequent affirmance of the corporation's conviction—seemed to be of the view that the government's use of discovery procedures in a civil suit against a corporation involving matters as to which criminal prosecution is contemplated or pending against the corporation or its officers is so inherently unfair that, even though the government makes no apparent use of the interrogatories in the criminal action, and even though the criminal defendants make no showing that the answers to the interrogatories prejudiced them, the government is under an initial obligation to establish that it obtained no leads from the interrogatories. This underlying due process basis for the court's holding is suggested, in part, by the citation in the opinion (App. 367) of *United States* v. *Parrott*,

248 F. Supp. 196 (D.D.C.), and related cases, which focus, not primarily on the Fifth Amendment privilege, but more generally on the propriety of commingling parallel civil and criminal inquiries. Pertinent also is the fact that respondents' arguments in the courts below were cast principally in due process terms (see Resp. Br. in court of appeals, p. 17). Although we disagree with respondents' conclusions as to this case, we agree that the due process clause provides an appropriate framework for deciding issues which arise where an agency vested with responsibility for administering both civil and criminal statutes decides in the public interest to proceed civilly pending a determination as to whether criminal prosecution should also be sought. Accordingly, after dealing with the issue of self-incrimination, we shall turn to these due process considerations.

I. SUBMISSION OF THE INTERROGATORIES TO DETROIT VITAL FOODS, INC., DID NOT COMPEL RESPONDENTS TO FURNISH ANY ANSWERS THERETO AND THUS DID NOT VIOLATE THEIR PRIVILEGE AGAINST SELF-INCRIMINATION

In holding that respondents' privilege against self-incrimination was violated by the government's submission of interrogatories to Detroit Vital Foods, Inc., the court below said that respondents had been placed in the position of either answering the interrogatories or suffering almost certain forfeiture of "their" property—a choice which, in the court's view, amounted to compulsion prohibited by the Fifth Amendment (App. 365). We believe there are critical deficiencies in this analysis.

1. In holding that submission of the interrogatories to the corporation had the effect of compelling respondents to answer them, the court below failed to take into consideration the law surrounding the use of interrogatories under Rule 33 of the Federal Rules of Civil Procedure.[12] There is no requirement under Rule 33 that the person answering interrogatories on behalf of a corporation have personal knowledge of the truth of the answers furnished. Respondent Kordel did not answer the interrogatories at all. Respondent Feldten, who answered for the corporation, expressly disclaimed having personal knowledge (see *supra,* p. 6). Thus, as to neither respondent were the answers to the interrogatories testimony which could be used against the individual respondents as admissions against interest.

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[12] Rule 81(a)(2), F. R. Civ. P., which was in effect at the time of the civil action herein, provided that in cases of "forfeiture of property for violation of a statute of the United States" the Federal Rules of Civil Procedure were applicable in pre-appeal proceedings "to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity." Federal Rule of Civil Procedure 33, providing for the use of interrogatories by either party in a civil action, was specifically based on former Equity Rule 58. The Federal Rules were consistently held to apply to forfeiture actions under 21 U.S.C. 334. See, *e.g., United States* v. *88 Cases* * * * *Bireley's Orange Beverage,* 5 F.R.D. 503 (D. N.J.); *United States* v. *5 Cases* * * * *"Figlia Mia Brand,"* 179 F. 2d 519, 522 (C.A. 2), certiorari denied, 339 U.S. 963. Rule 81(a)(2), F. R. Civ. P., insofar as here pertinent, was abolished effective July 1, 1966. The Federal Rules of Civil Procedure relating to interrogatories continue, however, to be applicable to civil forfeiture actions under new Supplemental Rule A. See, also, Supplemental Rule C.

Similarly, there is no requirement that the interrogatories be answered by an officer or agent of the corporation who might incriminate himself by doing so. Like any other privilege or objection, the privilege against self-incrimination may be invoked by an individual designated to answer interrogatories on behalf of a corporation, and, if the claim of privilege is upheld, the individual concerned need not answer. See *United States* v. *42 Jars * * * Bee Royale Capsules,* 162 F. Supp. 944, 946 (D. N.J.), affirmed, 264 F. 2d 666 (C.A. 3); see, also, *Hickman* v. *Taylor,* 329 U.S. 495. It is true that invocation of the privilege by one or more agents or officers of the corporation designated to answer interrogatories does not end the corporation's obligation to supply the answers. The cases unanimously hold, in accordance with the clear language of Rule 33,[13] that submission of interrogatories to a corporation imposes a duty on the corporation "to appoint an agent who could, without fear of self-incrimination, furnish such requested information as was available to the corporation." *United States* v. *3963 Bottles * * * Enerjol,* 265 F. 2d 332, 336 (C.A. 7), certiorari denied, 360 U.S. 931; *United States* v. *42 Jars * * * Bee Royale Capsules,* 264 F. 2d 666, 670 (C.A. 3); *United States* v. *48 Jars * * *,* 23 F.R.D. 192, 193–196 (D. D.C.); *United States* v. *Article of Drug * * *,* 43 F.R.D. 181, 186–187 (D. Del.). Even if

[13] The Rule provides: "Any party may serve upon any adverse party written interrogatories to be answered by the party served, or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, *who shall furnish such information as is available to the party*" (emphasis added).

no ordinary agent or officer of the corporation is available to provide the other party with answers, the corporation remains under a duty to appoint some agent, such as its attorney, to answer the interrogatories. *United States* v. *48 Jars, supra; United States* v. *Article of Drug, supra.* The obligation, however, is solely that of the corporation; there is no compulsion on any officer or agent thereof to furnish the information sought. Thus neither of the respondents was "compelled" to give any testimony.

In their brief in opposition to the petition for certiorari, respondents suggested that they were in practical effect compelled to answer the interrogatories since they were the only persons in the corporation with knowledge of the matters to which the interrogatories related, and thus the information had to come from them. This argument is not available to them, however, because they never attempted to make a showing in either the civil action or the courts below that no officer, employee or other agent of the corporation could answer the interrogatories without incriminating himself.[14] See *Luey* v. *Sterling Drug, Inc.*, 240 F. Supp. 632 (W.D. Mich.); compare the special situations in *Hickman* v. *Taylor*, 329 U.S. 495, 511–512, and *Communist Party* v. *United States*, 331 F. 2d 807, 814 (C.A.D.C.), certiorari denied, 377 U.S. 968. Relying upon the latter case, respondents attempted, in their

[14] Respondents thus waived any right to claim their Fifth Amendment privilege on the basis of a contention that they were the sole corporate repositories of the information sought (see *infra*, p. 22).

brief in opposition, to shift to the government the burden of proving the existence of a suitable officer of the corporation who could answer the interrogatories without risk of self-incrimination. The *Communist Party* case does not, however, support respondents' contention. There the question was the validity of the Party's conviction for failing to register under the Subversive Activities Control Act and the court held that it was an element of the crime to show that there was a person who could have registered the Party without substantial risk of self-incrimination. The court held that the principles of the *Enerjol* (265 F. 2d 332) and *Bee Royale* (264 F. 2d 666) cases cited *supra*, that a corporation served with interrogatories is obligated if necessary to appoint an agent who could furnish the information sought, could not be applied to the Communist Party, in view of the fact that mere association with the Party was incriminating. Even though the court recognized that the Party was more likely than the government to know whether a volunteer was available, the court placed the burden of proof as to this issue on the government, since requiring the Party to make the showing would in all likelihood require a member of the Party to waive his privilege and testify as to his efforts to find a volunteer (331 F. 2d at 814). There is no reason to apply any such rule here.[13]

[13] *Hickman* v. *Taylor*, *supra*, illustrates another exception to the general rule not applicable here. There the interrogatories sought information as to the work products of an adverse

Moreover, it is conclusive against respondents' claims of Fifth Amendment privilege that neither respondent Feldten, who answered the interrogatories, nor respondent Kordel, who did not, ever invoked the privilege against self-incrimination with respect to any interrogatory. This Court has repeatedly held that the privilege against self-incrimination is not available to one who fails to invoke it in a timely and proper manner. See, *e.g.*, *Marchetti* v. *United States*, 390 U.S. 39, 61; *Rogers* v. *United States*, 340 U.S. 367, 372–375; *United States* v. *Monia*, 317 U.S. 424, 427.

2. The court of appeals further erred in its view that the individual respondents were compelled to incriminate themselves because they were required either to furnish the evidence or to lose their property (App. 365). Respondents were not parties in the libel action and claimed no personal interest in the property which was the subject of that proceeding. The property belonged to the corporation, which has no privilege against self-incrimination and could not assert such a privilege on behalf of any individual officer or employee. *E.g.*, *Campbell Painting Co.* v. *Reid*,

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party's counsel prepared with a view to the pending litigation. The Court found that the policy against invading the privacy of an attorney's course of preparation was so strong that "a burden rests on the one who would invade that privacy to establish adequate reasons" therefor (329 U.S. at 512). Here the interrogatories did not seek to invade a lawyer-client relationship or any other privilege of the corporation.

392 U.S. 286; *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186; *United States* v. *White*, 322 U.S. 694; *Wilson* v. *United States*, 221 U.S. 361.

Whatever the financial relationship of respondents to the corporation—a relationship which does not appear with specificity from the record (see App. 369–370) [16]—they could not utilize the benefits of the corporate form of doing business and still claim an individual, personal interest in the corporate property for the purpose of invoking the Fifth Amendment privilege against self-incrimination. See *United States* v. *White, supra.* Respondents did not lose their personal privilege not to give personal testimony by undertaking to do business in corporate form. They cannot, however, assert a personal *property* interest in goods owned by the corporation. In characterizing Detroit Vital Foods, Inc., as "merely the corporate device through which Kordel sold his products" (App. 369), the court of appeals in effect allowed Kordel to pierce the corporate veil he himself had created, presumably for his own business advantage. It endowed him with a privilege he did not assert as to questions he personally was not obliged to, and did not in fact, answer. The court below thus improperly extended to Kordel, who took refuge behind the corporate veil, property rights and personal privileges beyond those that

[16] The court below stated, as to respondent Kordel, that, although the extent of his ownership in the corporation was not disclosed by the testimony, he "evidently was a major stockholder" (App. 370).

would have been available to him if he had been doing business as an individual."[17]

II. THERE WAS NO VIOLATION OF DUE PROCESS BY THE USE OF INTERROGATORIES IN THE CIVIL SUIT

As we have noted above, the opinion below, while couched in terms of the privilege against self-incrimination, strongly implies that it was basically unfair for the government to insist on any answers to interrogatories in the civil suit at a time when the possibility of bringing a criminal action was in contemplation. The court reversed respondents' convictions without any detailed consideration of the relationship of the answers to the interrogatories to the evidence in the criminal case. It reversed the convictions even though none of those answers was used in the criminal case and even though there was no showing that the answers to the interrogatories produced any evidence used in the criminal prosecution. Rather,

[17] With respect to respondent Kordel, the court below held in the alternative that, "if it should be conceded that Kordel was under no coercion to answer the interrogatories, we are of the opinion that Feldten's admissions were not admissible against him under the rule of *Bruton* v. *United States*, 391 U.S. 123" (App. 370). This holding is plainly erroneous. *Bruton* held that the admission into evidence in a joint trial of the confession of a co-defendant violated the defendant's *Sixth Amendment right of confrontation*. See, also, *Harrington* v. *California*, No. 750, O.T. 1968, decided June 2, 1969. Here, as previously indicated, the answers to the interrogatories, which in any event did not constitute a confession by Feldten, were not admitted into evidence in the criminal prosecution. Obviously, therefore, the right of confrontation was not implicated or infringed and *Bruton* is totally inapposite.

it held, since the government had insisted on having the interrogatories answered, the government was under an obligation affirmatively to show that none of the answers in any way led to any evidence utilized in the criminal prosecution. Thus, the effective holding is that whenever the government goes ahead with a civil suit against a corporation and uses the normal processes of civil procedure in that suit the individual officers of the corporation acquire immunity from criminal prosecution, unless the government affirmatively shows that no information obtained in the civil proceeding in any way led to evidence for the criminal prosecution. This is an unwarranted rule which would unduly hamper the work of many administrative agencies. We recognize that the existence of parallel civil and criminal proceedings poses delicate problems for the agencies involved. We do not deny the need for care in such situations. Our position is that there is no reason for the broad *per se* approach of the court below, and that there is nothing in the facts of this case to show any abuse by the government or detriment to the individual respondents justifying the reversal of their convictions.

A. THE BRINGING OF A CIVIL SUIT DOES NOT BAR CRIMINAL PROSECUTION OR THE USE OF EVIDENCE OBTAINED IN THE CIVIL SUIT UNLESS THERE IS A SHOWING OF BAD FAITH OR UNNECESSARY INJURY TO THE DEFENSE

Federal agencies in a wide variety of fields, including antitrust, internal revenue, food and drug, and securities regulation, among others, are vested by statute with the responsibility of administering laws providing both civil and criminal remedies against offending

corporations or individuals. Such agencies often find it imperative to act quickly by initiating civil or administrative proceedings against goods or persons in order to protect the public from harm while reserving for more studied consideration the question whether to recommend criminal prosecution of the corporation or of various individuals.

The food and drug laws here involved are a prime illustration of the need for prompt civil action. Where, as here, the Food and Drug Administration believes that misbranded drugs are being distributed, there is an obvious need to bring civil condemnation proceedings to protect the public by removing the misbranded drugs from circulation. There is also a need in such civil proceedings to proceed to judgment. Many foods and drugs are perishable or subject to deterioration with age, so that prompt adjudication is required if the value of the seized articles is to be at least partially preserved. For this and other reasons, Congress has specifically provided in 21 U.S.C. 334:

> * * * That no libel for condemnation shall be instituted under this chapter, for any alleged misbranding if there is pending in any court a libel for condemnation proceeding under this chapter based upon the same alleged misbranding, and not more than one such proceeding shall be instituted if no such proceeding is so pending, except that such limitations shall not apply (1) when such misbranding has been the basis of a prior judgment in favor of the United States, in a criminal, injunction, or libel for condemnation proceeding under this chapter, or (2) when the Secretary has probable

> cause to believe from facts found, without hearing, by him or any officer or employee of the Department that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer. * * *

Under this statute, it was necessary to obtain a favorable "judgment" in the forfeiture proceeding to enable the Food and Drug Administration to proceed by multiple seizures against additional quantities of the drugs Korleen and Frutex being marketed by the corporation.[18] While the alternative statutory procedure of a determination by the Secretary to permit multiple seizures of the drugs might have been used, see *Ewing* v. *Mytinger & Casselberry,* 339 U.S. 504, that method is in practice usually reserved for more critical situations in which the misbranding might result in uses which would have a directly harmful effect on the user. The procedure of a determination by the Secretary is more cumbersome for the agency and would be less likely to act as a deterrent to continued marketing of the drugs than a favorable "judgment" of condemnation entered by a court. It was thus both legitimate and necessary for the Food and Drug Administration in this case to seek to expedite the civil action by discovery procedures such as the service of the interrogatories which would prepare the groundwork for a motion for summary judgment.

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[18] The libel in this case concerned only thirty-nine cases of Korleen tablets and 62 cases of Frutex wafers (see App. 291). As indicated *supra*, p. 3, the products of Detroit Vital Foods, Inc., were sold in health food stores across the country (see, also, App. 362).

Another example of the need for prompt civil proceedings is in the field of securities regulation.[19] If a fraudulent stock is being sold, the Securities and Exchange Commission would obviously regard, as its first obligation, the taking of steps to keep the stock from being sold to the general public. It may or may not know at that time whether the course of conduct underlying the activity seemed sufficiently deliberate to warrant criminal prosecution; it may or may not know which individuals were primarily responsible for the fraud. Whether it does or not, it cannot refrain from taking the necessary action to keep the stock off the market, whether by administrative proceedings or a suit for an injunction. Even if the conduct of a particular person is believed to have been so grossly fraudulent that it is fairly certain that criminal proceedings will eventually be brought, the agency would not be justified in leaving the public unprotected by refraining for that reason from bringing a civil action; nor should it refrain from using against him the normal procedures available against any other civil defendant of less culpability. If, on the other hand, a person was believed not to have been guilty of criminal conduct, but evidence developed in good faith in a civil proceeding reveals him to be criminally culpable, he should not obtain, in effect, immunity from criminal liabilty for his conduct.

[19] A letter dated July 17, 1969, to the Solicitor General from the General Counsel of the Securities and Exchange Commission, expressing the Commission's concern about the present case and indicating in some detail how its work could be affected by the decision herein, has, with the Commission's consent, been reproduced as an Appendix to this brief (*infra*, pp. 43–48).

This Court long ago recognized that remedial civil action need not await the outcome of criminal prosecution based on the same acts. In *Standard Sanitary Mfg. Co.* v. *United States*, 226 U.S. 20, 51–52, a suit under the Sherman Act to dissolve a combination, one of the corporate defendants contended that error had been committed in the denial of its motion for an extension of time to take testimony. The specific claim was that the pendency of a criminal action brought by the United States involving the same matters had caused certain officers of the corporation, whom it desired to call as witnesses, to refuse to testify. In rejecting the contention, this Court observed (226 U.S. at 52):

> The Sherman Act provides for a criminal proceeding to punish violations and suits in equity to restrain such violations, and the suits may be brought simultaneously or successively. The order of their bringing must depend upon the government; the dependence of their trials cannot be fixed by a hard and fast rule or made imperatively to turn upon the character of the suit. Circumstances may determine and are for the consideration of the court. An imperative rule that the civil suit must await the trial of the criminal action might result in injustice or take from the statute a great deal of its power. Besides a suit by the Government there may be an action for damages by a "'person injured by reason of anything forbidden by the Act." Must it also wait? Indeed, the reasons urged for the rule, if logically extended, would compel the postponement of the enforcement of the civil remedies until the exhaustion of criminal pros-

> ecutions or their expiration by lapse of time. Until either event occurs the danger of incrimination cannot be said to have passed. It is manifest, therefore, that the most favorable view which can be taken of the rights of defendants in such situation is that they depend upon the discretion of the court in the particular case. We find no abuse of such discretion in the case at bar.

See, also, *Abel* v. *United States*, 362 U.S. 217, 228–230.

There is no practical way in which administrative agencies can wholly insulate civil and criminal proceedings. The investigation initially tends to be unitary and undifferentiated and will normally, as here, have been undertaken by the same government agents. In many instances, it may be necessary for the agency to hold an administrative hearing to determine whether any action is justified, civil or criminal. It cannot be known in advance what may be developed at that hearing. A rule that evidence or information obtained in the civil or administrative proceeding cannot be utilized in the criminal case would require duplication of effort by government agency personnel on a massive scale and would serve no purpose. Nor is there any basis for a distinction between evidence obtained in the civil trial itself and evidence obtained in the investigation leading thereto. In the course of civil proceedings it is quite common for the government to use interrogatories or other forms of discovery designed to simplify the issues and thereby expedite the civil action. So long as this use of civil

discovery techniques is done in good faith to serve the objectives of the civil suit, there is no reason why the government should not normally be able to use any information thus secured to decide whether criminal prosecution is warranted, and to prove its case, just as it could use any other reliable information that might come to it from any source. If, for example, litigation between two private parties revealed evidence of criminality, the government could utilize evidence so disclosed. See *Standard Sanitary Mfg. Co.* v. *United States, supra,* 226 U.S. at 51–52; *United States* v. *American Radiator & Standard Sanitary Corp.,* 388 F. 2d 201, 204 (C.A. 3); cf. *United States* v. *Simon,* 373 F. 2d 649 (C.A. 2), certiorari granted *sub nom. Simon* v. *Wharton,* 386 U.S. 1030, vacated as moot, 389 U.S. 425; *D'Ippolito* v. *American Oil Co.,* 272 F. Supp. 310 (S.D.N.Y.). The fact that the government in good faith has brought the civil litigation for the purpose of protecting the public interest should not require a different result.

This is not to say that the existence of parallel criminal and civil remedies imposes no obligations on the government to proceed with care so as not to violated the rights of a prospective criminal defendant. The government cannot, of course, use one kind of proceeding solely for the purpose of obtaining evidence for use in another type of proceeding. This Court and others have indicated that such bad faith use of criminal or civil procedures is impermissible. See *United States* v. *Procter and Gamble Co.,* 356 U.S. 677, 683–684; *United States* v. *Pennsalt Chemicals Corp.,* 260 F. Supp. 171 (E.D. Pa.); cf. *Beard* v.

N.Y. Central R. Co., 20 F.R.D. 607 (N.D. Ohio); see, also, *Abel* v. *United States*, 362 U.S. 217, 225–230. Even without a showing of bad faith, the courts have found unfairness where a government agency, after initiating an administrative or civil action against the defendant, did not inform him of the fact that criminal prosecution against him for the same conduct was seriously contemplated or had been recommended. Such failure to apprise the defendant of the contemplated criminal proceeding has been held to preclude the government's use therein of any evidence obtained in the civil proceeding. See *United States* v. *Parrott*, 248 F. Supp. 196 (D.D.C.), and cases cited therein; cf. *Gouled* v. *United States*, 255 U.S. 298. But when there has been no deception or unjustified failure to apprise a defendant that criminal prosecution might ensue (as where there had been no preliminary consideration of criminal prosecution), the government is permitted to use evidence disclosed by the civil investigation in the criminal case. See *United States* v. *Parrott*, No. 66 Cr. 243 (S.D.N.Y.), decided February 14, 1969; see, also, *United States* v. *Sclafani*, 265 F. 2d 408, 414–415 (C.A. 2), certiorari denied, 360 U.S. 918; *United States* v. *Light*, 394 F. 2d 908, 913–914 (C.A. 2); *United States* v. *Squeri*, 398 F. 2d 785 (C.A. 2).

Even where a civil action is instituted and pursued by the government in entire good faith, a postponement of the civil action may be justified if a criminal prosecution is also pending and the defendant might be prejudiced therein by disclosure in the civil proceedings of the nature or evidence of his defense. Such

a postponement would be particularly warranted in situations where the public interest can be protected by means of interim relief in the civil action without proceeding to final judgment. For example, if the defendant in a securities fraud case consented to a preliminary injunction withdrawing the stock from the market, it normally would not seem to be necessary, if a criminal prosecution was also recommended, to proceed further in the civil case until after the criminal prosecution has been terminated. The Internal Revenue Service, to cite another example, follows a general policy of not instituting civil proceedings to recover monies where a criminal prosecution involving the same facts is pending or seriously contemplated. See *United States* v. *Jaskiewicz,* 278 F. Supp. 525, 536–537 (E.D. Pa.). In collecting tax deficiencies, there is seldom the need for immediate action to protect the public to be found in the case of stock frauds or food and drug violations.

Similarly, in *Silver* v. *McCamey,* 221 F. 2d 873 (C.A.D.C.), the plaintiff, a taxicab operator, had been arrested for rape. While this charge was pending, the taxicab operators' licensing authority directed him to answer charges that he was not fit to operate a taxicab, in part because of the alleged rape. After a hearing, the authority revoked the plaintiff's license. The court of appeals, in a suit brought by the plaintiff to restore his license, determined that to hold the hearing during the pendency of the rape case violated the plaintiff's procedural rights, since he would be required in the administrative hearing to disclose his anticipated defense in the criminal case. The court found that there

was no need for the agency to hold the hearing on the merits while the rape charge was pending, since the licensing authority could temporarily suspend the plaintiff's license, and thus fully protect the public, pending the outcome of the criminal charge. Manifestly, the situation would have been different if the agency had lacked authority to suspend the license, and had to press the proceeding to completion in order to prevent the defendant from continuing to drive a taxi. Where pursuit of the civil action is necessary to protect the public interest, its postponement has rightfully been refused. Thus, in *United States* v. *Simon*, 373 F. 2d 649 (C.A. 2), certiorari granted *sub nom. Simon* v. *Wharton*, 386 U.S. 1030, vacated as moot, 389 U.S. 425, the court of appeals rejected an argument that accountants whose depositions were sought by a Chapter X trustee in bankruptcy in a suit against their firm, should not be required to testify until resolution of a criminal indictment pending against them involving the same facts. The court reasoned (373 F. 2d at 652):

> * * * We assume without deciding that the lower court had power to issue * * * an injunction, but we hold that it should not have done so, as there is no showing that the depositions sought by the trustee would interfere with the trial of the indictment or the appellees' preparation of their defense.
>
> This appeal requires us to balance appellees' desire to prevent pretrial disclosure of their factual contentions to the prosecution in the Southern District criminal proceeding, without asserting their Fifth Amendment privileges

against self-incrimination, against the interest of the trustee, representing numerous creditors and public security holders of Continental, in the expeditious progress of the Eastern District action. The trustee requires the appellees' deposition testimony to complete his preparation for the trial of the Eastern District action, which must be resolved before the bankruptcy reorganization of Continental, already three and one-half years old, can be completed. It is conceded that the trustee seeks in good faith to depose appellees for purposes of the Eastern District action, and that there has been no consultation on lines of questioning between the trustee and the United States Attorney for the Southern District.

Under these circumstances, the public interest in the progress of the Eastern District action clearly outweighs the appellees' interest in withholding their testimony until after the Southern District trial without invoking their privileges against self-incrimination. It could hardly be contended, and appellees do not contend, that the prosecution in the Southern District could be enjoined from using the deposition testimony given by the appellee Simon before the Southern District indictment was returned. As long as appellees' preparation for the Southern District criminal trial is not hampered, we see no valid distinction in the fact that appellees' remaining depositions could not be scheduled until after the indictment was returned. In both cases, if appellees choose not to assert their privileges against self-incrimination, we see no reason why their testimony should be withheld from the trustee. The fact

> that additional testimony thereby becomes available to the government is merely the natural byproduct of another judicial proceeding; and to that extent it might be "discovery," but it is not discovery which the government has initiated or promoted for the purpose of circumventing the Federal Rules of Criminal Procedure or any constitutional right of the appellees. * * *

A distillation of the various cases in this field seems to us to suggest the following rules. The government is entitled to institute and proceed with a civil case and to use the normal processes of discovery in connection therewith even though there is a possibility of criminal prosecution, unless the civil proceedings are used in bad faith to obtain evidence for a criminal prosecution. Where a criminal prosecution is actually pending against a defendant while the civil case is also pending, and the civil trial or the use of civil discovery proceedings might result in disclosure of the theory and evidence of the criminal defense, a court should weigh the public interest in completion of the civil action against the potential injury to the defendant. If there is no substantial public interest in pressing the civil action promptly to judgment and there is a real, not purely theoretical, possibility that the civil process will be injurious to the criminal defense, the civil action should be postponed. The civil action should not, however, be postponed where there is an important public interest in letting it go forward. A defendant under indictment may protect himself by claiming the privilege against self-incrimination in the civil action. Where criminal prosecution has not

actually been instituted while civil proceedings are pending but is in serious contemplation, it may be necessary to warn the civil defendant of the possibility of criminal prosecution so that he may make an informed judgment as to whether to claim his privilege or seek other relief. In short, the government may proceed by parallel civil and criminal remedies, but it must do so fairly.

B. THERE WAS NO UNFAIRNESS IN THE USE OF INTERROGATORIES IN THIS CASE

By every standard discussed above, there was no unfairness on the part of the government in proceeding with the libel action in order to prevent mislabelled drugs from being peddled to the public. As the district court found (App. 286–288) and the court below did not dispute (App. 367),[20] the government's interrogatories in the civil action to condemn the drugs were served in good faith, as part of the government's legitimate effort to expedite the civil suit. There was a need to proceed to judgment in the forfeiture proceeding in order to protect the public against the mislabelled products which were being sold throughout the country. There was no deception or failure by the government to apprise the corporation or respondents of the fact that criminal prosecution of them was being contemplated. As previously indicated (*supra*, pp. 5–6), the Food and Drug Ad-

[20] As previously pointed out, the court of appeals assumed good faith on the part of the Food and Drug Administration in the present case but held that circumstance to be irrelevant in light of its determination that respondents' Fifth Amendment privilege against self-incrimination had been infringed.

ministration sent the corporation, pursuant to 21 U.S.C. 335, a notice of hearing shortly after service by the agency of its initial interrogatories, informing the corporation that criminal prosecution of it and respondents was being considered, in part for the same conduct which was the subject of the condemnation proceeding. The government did not proceed with the interrogatories in order to obtain evidence for the criminal case. It already had recordings of, and notes taken at, Kordel's lectures, as well as copies of the labeling material distributed with the drugs. Indeed, it did not use the answers at all in its criminal case. The government used the interrogatories merely as part of an effort to bring the forfeiture proceeding to an expeditious conclusion—which is one of the normal, legitimate functions of such discovery procedures. The interrogatories were addressed to the corporation and could be answered by an agent of the corporation other than the respondents, who were in no way obligated to give personal testimony. There is thus no reason why respondents' convictions should have been reversed merely because the interrogatories had been addressed to the corporation.

The court of appeals was apparently influenced in this case by its belief that the interrogatories in the civil condemnation action were broader than was necessary for the purposes of the suit (see App. 369). As we have indicated, even the submission of improper and overbroad interrogatories would not have violated respondents' privilege against self-incrimination since they were under no compulsion to

answer.[21] In any event, the interrogatories at issue here did not seek information which was not directly pertinent to the civil case. The allegation in the libel was, in part, that the drugs were misbranded in violation of 21 U.S.C. 352(f) because of failure of the labeling to bear adequate directions for use for the purposes for which the drugs were intended. An oral statement can constitute proof of the intended use of a product. *E.g., Nature Food Centres, Inc.* v. *United States,* 310 F. 2d 67 (C.A. 1), certiorari denied, 371 U.S. 968; *United States* v. *Article of Drug* * * * *B-Complex Cholinos Capsules,* 362 F. 2d 923 (C.A. 3). The theory of the government's libel was that products labeled as foods were being represented, in written matter and in oral lectures, to be efficacious as drugs. While the government could have proved these oral representations at trial by means of tape recordings in its possession, it manifestly would have expedited the civil suit if the government could establish the content of these representations by means of admissions to the interrogatories and thus be in a position to move for summary judgment. See *United States* v. *Article of Drug* * * *, 43 F.R.D. 181, 188 (D. Del.). It was therefore proper to determine whether the corporate claimant agreed that representations had been made by corporate representatives as to the dis-

[21] Moreover, Rules 30(b) and 33, F.R. Civ. P., provide the means by which a party may be excused, in the civil proceeding itself, from answering improper or overbroad interrogatories. One who fails to pursue this remedy and chooses, instead, to answer the interrogatories should not be heard to claim, in a subsequent proceeding, that the interrogatories violated his rights.

ease-curing efficacy of the products. The interrogatories were directed toward these ends and were thus pertinent to the issues in the civil suit.

In these circumstances it was error for the court below to hold that the government affirmatively must show that, even though it did not introduce the answers to the interrogatories in the criminal prosecution, it also did not use anything said in the answers as a lead to evidence which was admitted in the criminal prosecution. It is, indeed, difficult to see how the corporation's answers could have led to evidence of anything. We do not, however, undertake to rest on that fact. Our position is that it was entirely proper for the government to proceed as it did in the civil suit against the corporation and that the government was therefore under no duty to show that the evidence in the criminal prosecution was obtained wholly independently of the civil suit. Accordingly, the reversal of respondents' convictions was unwarranted.

CONCLUSION

It is therefore respectfully submitted that, with respect to each of the respondents, the judgment of the court of appeals should be reversed and the judgment and sentence of the district court should be reinstated.

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AUGUST 1969.

APPENDIX

SECURITIES AND EXCHANGE COMMISSION,
Washington, D.C., July 17, 1969.

Honorable ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C.

DEAR SIR: In *United States v. Lelord Kordel, et al.* — F. 2d — (C.A. 6, 1969), in which the Supreme Court recently granted certiorari, the Court of Appeals for the Sixth Circuit reversed the criminal convictions of the defendants for violations of the federal food and drug laws. The basis of the reversal was the holding that certain evidence used in the criminal case had been obtained from the defendants in a prior civil action involving the same facts, in violation of the defendants' rights against self-incrimination under the Fifth Amendment to the United States Constitution. Serious problems for this Commission may arise if there should be a decision by the Supreme Court generally setting forth the proposition that the government may not use incriminatory evidence in a criminal action that had been obtained from a defendant in a civil case brought by a government agency involving the same facts.

This Commission typically pursues one or more of the following three types of enforcement actions when investigations conducted by its staff indicate that serious violations of the federal securities laws are occurring or have occurred: (1) civil injunctive actions

litigated in federal district courts;[1] (2) administrative proceedings litigated before Commission hearing examiners and ultimately the Commission itself;[2] and (3) referral to the Department of Justice for criminal prosecution in federal district courts.[3] Additionally, the Commission's staff often participates in corporate reorganization proceedings pursuant to Chapter X of the Bankruptcy Act,[4] including investigations conducted by Chapter X trustees seeking to learn whether there may have been violations of laws giving rise to causes of action on behalf of the estate.[5] Nothing in the federal securities statutes indicates that Congress intended that these activities be mutually exclusive.

The investigation and preparation of a major criminal case under the securities laws may take several years from the time the offense is discovered. There is not in federal securities law cases the kind of *"corpus delicti"* present in the investigation of more traditional crimes. At the commencement of an investigation, our staff can seldom even be sure that a statutory violation has occurred. It is necessary that we gather facts from numerous persons involved in various commercial or business transactions to determine whether or not we are satisfied that violations have occurred and, if so, whether such violations are sufficiently serious to warrant presentation to a grand jury. As an investigation continues, we may gather enough evidence to seek an injunction to stop what appears to be a continuing violation, even though there may not

[1] See, *e.g.*, 15 U.S.C. 77t(b) and 78u(e).

[2] See, *e.g.*, 15 U.S.C. 77h(d) and 78o(b).

[3] See *e.g.*, 15 U.S.C. 77t(b) and 78u(e).

[4] 11 U.S.C. 208.

[5] 11 U.S.C. 567. See *Securities and Exchange Commission* v. *Krentzman*, 397 F. 2d 55 (C.A. 5, 1968).

yet be sufficient evidence of "criminal intent" to recommend criminal prosecution. Such evidence, however, may well be uncovered later in the investigation after civil or administrative proceedings have already been commenced.

In proving facts concerning particular business or commercial transactions in administrative or injunctive proceedings, we do not often have nonparticipant "eye-witnesses" who can testify to much of what occurred. We typically prove our cases by bits and pieces, in part by calling as witnesses participants in the transactions and by analyzing documentary evidence they may produce relating to the transactions in question. In attempts to exculpate themselves participants frequently testify or produce documents pointing to the violations of law that have occurred. If the use of such evidence were precluded in subsequent criminal cases, it would seriously hamper the investigation and prosecution of securities law crimes.

While a criminal case is being developed, it may be necessary to bring an injunction to stop the unlawful activities or to bring an administrative proceeding to determine whether broker-dealers who may be involved should have their registration revoked. By bringing one or both of these proceedings during the development of a criminal case, the Commission is able to prevent violators from continuing to defraud the investing public during the time required to convict them.

For example, 66 indictments and informations, involving 143 defendants, were returned during 1969 in 40 cases that the Commission had referred to the Department of Justice. In 16 of these cases the Commission had brought prior civil court actions, either injunctions or subpoena enforcement proceedings (and in one additional case the Commission had rendered

some assistance to the Food and Drug Administration in bringing an injunction action). In four other cases the Commission had brought prior administrative proceedings, either involving a broker-dealer or a registration statement of securities, and in three additional cases the Commission had participated in proceedings under Chapter X of the Bankruptcy Act involving certain of the persons indicted. Thus, in 24 of the 40 cases in which indictments were returned during the past fiscal year as a result of the Commission's investigations, the Commission had participated in some form of prior civil or administrative action.

It seems to us that a possible effect of the holding in the *Kordel* case will be to make it extremely difficult, if not impossible as a practical matter, for this Commission to pursue parallel or successive proceedings against violators.

We have in recent years been encountering some difficulties in our criminal prosecutions, based upon claims somewhat analogous to the claims raised by the defendants in the *Kordel* case. Thus, during our recent investigation of the financial collapse of the Texas-based conglomerate, Westec Corporation, our staff was asked to participate in the Section 21(e) hearings being conducted by the Chapter X trustee. We did so participate; thereafter, we criminally prosecuted certain Westec officers for violating the federal securities laws. In a presently outstanding appeal from criminal convictions in that case, one of the former Westec officers is alleging that the Commission utilized "parallel" civil bankruptcy hearings to gather evidence to be used in the subsequent criminal prosecution and thereby allegedly violated the constitutional rights of the defendant. See, *United States* v. *James W. Williams* (C.A. 5, Nos. 26829 and 26830).

Similarly, in an investigation of trading in the stock of Rand Development Corporation, the Commission suspended trading in the Rand stock,[6] and thereafter assisted the Food and Drug Administration in the conduct of a civil injunctive action against Rand Development and one of its principals, James Rand, III. In the civil case, Rand was called by the government to the witness stand and testified regarding certain of his transactions regarding the pledge and sale of Rand Stock. Thereafter, we obtained an indictment against Rand for violating the federal securities laws and the federal mail fraud statute. *United States* v. *Rand Development Corporation and James Rand, III* (CR No. 68–433, N.D. Ohio, 1969). Rand has filed a motion to dismiss the indictment, relying on the *Kordel* case, claiming that the S.E.C. used the testimony which he gave in the civil F.D.A. case in order to obtain the subsequent criminal indictment against him. This motion is presently *sub judice.*

To date we have been generally successful in defeating claims in Commission-developed criminal cases where defendants or prospective defendants have alleged that the Commission's staff has utilized prior or parallel civil or administrative proceedings in order to obtain evidence for a subsequent criminal prosecution;[7] however, we have had at least one indictment dismissed, based in part upon such claims.[8]

[6] Securities Exchange Act Release Nos. 8026 and 8081.

[7] See, *e.g.*, *Thal* v. *Pitman* (*Commonwealth Financial Corporation*), *et al.*, 288 F. Supp. 786 (E.D. Pa., 1968), *aff'd*, 408 F. 2d 640 (C.A. 3, 1969), *certiorari denied*, — U.S. — (1969), where the court held it was proper for the Commission's staff to participate in civil bankruptcy hearings at the same time a criminal investigation of the defendant was being conducted.

[8] *United States* v. *Parrott*, 248 F. Supp. 196 (D.D.C., 1965); but see, *United States* v. *Parrott*, — F. Supp. — (S.D.N.Y., 1969), CCH Fed. Sec. L. Rep. ¶ 92,359.

It is readily apparent that, if the Supreme Court affirms the *Kordel* case, the defense of improper "parallel proceedings" will be raised in substantially all of our Commission criminal prosecutions that have been preceded by administrative or civil litigation. While the *Kordel* case may be distinguishable from our cases, should it be affirmed on broad grounds the holding could cause substantial hardship in attempting to protect the investing public and have violators criminally punished.

Sincerely,

PHILIP A. LOOMIS, Jr.,
General Counsel.

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IN THE

Supreme Court of the United States

October Term, 1969

No. 87

UNITED STATES OF AMERICA,

Petitioner,

against

LELORD KORDEL and ALFRED FELDTEN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS [redacted]

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LELORD KORDEL and ALFRED FELDTEN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Counter-Statement of Question Presented

Whether evidence, leads and admissions obtained in interrogatories directed to a corporation in a civil *in rem* case, and answered over objection, by an officer of the corporation, should have been suppressed in a parallel criminal case against the corporate officers based upon the same facts, where the civil *in rem* case and investigation of the criminal case went forward on a common front, and the interrogatories were designed and used to obtain information concerning the activities of the officers?

Counter-Statement of Facts

A. Introduction

The respondents, Lelord Kordel and Alfred Feldten, are president and treasurer respectively of Detroit Vital Foods, Inc., a Michigan corporation. Respondents and the corporation were indicted on July 17th, 1963 for violations of the Federal Food, Drug and Cosmetic Act, 21 U. S. C. 331 (a) and (k), i.e., introduction into interstate commerce of misbranded drugs and causing a drug to be misbranded after it had been shipped in interstate commerce. Respondents and the corporation were found guilty by a jury on five counts of the indictment, and judgments of conviction were entered in the United States District Court for the Eastern District of Michigan, Southern Division. Respondents received jail sentences and substantial fines were imposed upon them and their corporation.

On July 26th, 1968, the United States Court of Appeals for the Sixth Circuit reversed the judgments of conviction as to respondents and their corporation. The Court of Appeals held that the evidence and leads obtained over objection, by compulsory interrogatories in a civil *in rem* action seeking forfeiture of the property of respondents' corporation, should have been suppressed in a later criminal prosecution of respondents and the corporation based upon the same basic facts, because the Government had brought parallel civil and criminal proceedings, had utilized discovery to obtain admissions to prepare the criminal case, and the evidence and leads obtained by the interrogatories were used against respondents in the criminal case (App. 369). In essence, the Court of Appeals held that a civil case and a criminal case, with the same facts, may not go forward on a common front and be commingled

under circumstances wherein a prospective defendant in a criminal case is coerced into providing incriminating evidence for use in the criminal case, under penalty of either giving the evidence or suffering a forfeiture of his corporation's property.

On September 27, 1968, the Government petitioned the Court of Appeals for a rehearing, and on February 20, 1969, the Court of Appeals modified its prior opinion by affirming the judgment of conviction as to the corporation, and adhering to its prior decision reversing the judgments of conviction as to the respondents. This opinion of the Court of Appeals is reported at 407 F. 2d 570 and superseded the Court's prior opinion in all respects.

On April 21, 1969 a petition for a Writ of Certiorari was filed by the Government to review the Court of Appeals' reversal of respondents' convictions, and was granted by this Court on June 2nd, 1969. On April 21, 1969 a petition for a Writ of Certiorari was filed by counsel herein to review the Court of Appeals' affirmance of the corporation's conviction. The petition was denied by this Court's order dated June 2nd, 1969 (O. T., 1968, No. 1285). A petition for rehearing of the order was duly filed, but no ruling has been made by this Honorable Court as of the date of the writing of this brief.

B. Facts

On June 9, 1960, prior to the present indictment, a civil *in rem* action was brought by the Government under the Federal Food, Drug and Cosmetic Act, 21 U. S. C. 334, seeking condemnation of various drugs on the ground that they were misbranded and violative of 21 U. S. C. 331 (a) and (k). Detroit Vital Foods, Inc., respondents'

corporation filed an answer denyng the material allegations of the libel.

On January 9, 1969, the Government served written interrogatories in the civil case, consisting of approximately 1,300 questions seeking comprehensive and detailed information and admissions concerning the activities of the corporation and the respondents. The interrogatories sought information and admissions as to virtually every aspect and element which formed the subject of the present criminal case, including interstate commerce, labeling status, relationship of respondents to their corporation, lectures by respondent Kordel, and every conceivable fact related or even remotely related to the determination of whether respondents had misbranded the articles while held for sale, or had introduced misbranded articles into interstate commerce in violation of the Act (App. 304-320). Included in the unbelieveably searching interrogatories, were questions concerning the nature of any "business" relationship between respondent Kordel and Vital Foods Stores (Interrogatory 64); other names used by respondent Kordel; his relationship to other companies owned by him (Interrogatory 1); and statements made by Kordel at various lectures (Interrogatories 17-23, 54, 55). In short, the interrogatories were not merely directed to the corporate activities, but to virtually every aspect of respondent Kordel's business and individual activities. Further, most of the interrogatories were framed as requests for admissions, accompanied by alternative interrogatories requesting a full and complete statement of the true facts, and the name and address of each person who had personal knowledge of the truth of each of such facts, in the event the admission was not unqualifiedly made. (See for example, Interrogatories 1-4, App. 304).

Almost simultaneously with the service of the Government's interrogatories, and on or about January 19, 1961,

the Food & Drug Administration served the first of a series of notices upon respondents and their corporation,* pursuant to §305 of the Act, (21 U. S. C. 335) informing them that criminal action was contemplated against them for the same violations of the Act which were the subject of the civil *in rem* case. The said notice advised respondents that they were responsible for criminal violation of the Federal Food, Drug and Cosmetic Act and that they could present their views with respect to the charges before a decision was reached as to whether the matter should be referred to the Department of Justice for prosecution.

On April 7th, 1961 a motion was filed in the civil case for an order staying further proceedings therein, or in the alternative, for an order extending the time to answer the Government's interrogatories until after the disposition of the threatened criminal proceedings (App. 329). Specifically, it was urged that the Government had served notice of its intention to criminally prosecute respondents and their corporation; that the issues involved in the contemplated criminal case were identical to, and would be dispositive of, the issues involved in the civil case; that granting of the motion would be in the interest of substantial justice; and that the District Court should exercise its discretion under Rule 33 F. R. Civ. P. to enter an order enlarging the time to respond to the interrogatories as good cause had been shown (App. 332).

While specific reference to the Fifth Amendment was not made, the motion articulated respondents' real concern that response to the interrogatories would provide the Government with the opportunity to obtain information

* On April 19, 1961 two additional notices were sent, one directed to respondent Feldten and the other directed to respondent Kordel and "Vital Foods, Inc." On September 25th, 1961, after the interrogatories had been partially answered, a fourth notice was sent to respondents and their corporation. The four notices are reprinted in the appendix A hereto.

via civil discovery procedures which would not be available to it in the contemplated criminal case; and that the elements of proof in the criminal case were identical with the elements of proof in the civil case. In this connection, it was specifically noted that to require a disclosure of the information requested in the Government's interrogatories would provide information to assist the Government in sustaining its allegation of criminal violation of the Act, and would reveal the prospective defendants' evidence and defense (App. 331-336).

On April 10th, 1961, shortly after the motion was filed but prior to the District Court's disposition thereof, the Government filed a second series of "Additional Written Interrogatories" (App. 321-328), requesting further information concerning statements made by respondent Kordel in his lectures (additional interr. 19, 28); additional admissions coupled with alternative requests for detailed information as to the true facts in the event unqualified admissions were not made; further information concerning interstate shipments of various products, and labeling and formulae for same; and additional admissions that certain excerpts from Kordel's lectures were true and accurate (App. 327). These additional interrogatories comprised hundreds of separate and distinct questions concerning every conceivable detail of the activities of Kordel and his corporation which might have been omitted from the original interrogatories. Both sets of interrogatories aggregate more than 2,000 questions.

The Government opposed the motion before the District Judge, on the ground that the criminal proceedings had not yet been, and might never be instituted, and that the interrogatories therefore, should be answered. The District Judge, while recognizing the indentity of the facts involved in the civil and criminal cases, nevertheless denied the motion and ordered that the interrogatories should be

answered. The Court apparently concluded that there would be no prejudice or harm, because there was no certainty that criminal proceedings would, in fact, ever be instituted * (App. 337-339).

On July 20, 1961, objections to certain of the interrogatories were filed on the grounds, *inter alia*, that they called for admissions of violations of the Federal Food, Drug and Cosmetic Act, and were therefore improper. On September 5, 1961, answers to numerous interrogatories were submitted by the corporation and subscribed to by respondent Feldten as vice president ** (App. 345-348).

On September 13, 1962, the District Court entered an order sustaining the objections to certain of the interrogatories and requiring answers to others. Accordingly, on September 24th, 1962, supplemental answers to the Government's Additional Written Interrogatories were subscribed to by respondent Feldten as before (App. 349-352).

The answers and supplemental answers to the Government's interrogatories and additional interrogatories, contained admissions concerning interstate commerce; Kordel's status as president of the corporation; the use of various trade names; the placing of newspaper advertisements concerning Kordel's lectures; labeling for the products; statements made by Kordel, etc. (App. 345-352).

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* Any failure thereafter to commence criminal proceedings could not result from a lack of evidence, as everything needed to prosecute respondents was ordered to be provided under penalty of suffering a forfeiture of respondents' corporate property.

** On August 4, 1961 the General Counsel of the Food & Drug Administration prepared a motion to decree a default for failure to answer the interrogatories within the time specified. Knowledge of the preparation of such a motion was communicated to Mr. Josh Randolph, a Food & Drug officer in the Division of Case Supervision of the Food & Drug Administration between August 4 and August 10, 1961 (App. 236-237).

On August 31, 1961, with full knowledge of the District Judge's order to supply answers to the interrogatories (App. 237), Josh Randolph of the Food & Drug Administration made an initial recommendation to indict the respondents and their corporation. *At the specific request of Randolph, the answers to the interrogatories filed on September 5, 1961, were forwarded to him on September 22, 1961, and on October 18, 1961 Randolph wrote a memorandum reaffirming his August 31st recommendation that respondents be indicted* (App. 237).

On July 28, 1969, approximately one month after the District Judge had ordered answers to the interrogatories, another officer of the Food & Drug Administration, in recommending criminal prosecution against respondents, *made specific reference to the necessity to answer the interrogatories as ordered by the District Judge* (App. 143). Further, in that same written communication, the Food & Drug Administration officer specifically acknowledged that he anticipated no difficulty in establishing interstate commerce with respect to the product Korleen, because of the answers to the civil interrogatories (App. 141-143).

On September 22, 1961, Randolph instructed a representative of the Detroit office of the Food & Drug Administration to issue another notice of intention to commence a criminal action against respondents, and, as above noted, specifically requested the representative to send him a copy of the answers. The representative complied with Randolph's request and sent him a copy of the answers, together with three copies of the notice of criminal action which he had issued (App. 173-174).

On November 29, 1962, the civil action was terminated by a consent decree, in which it was agreed by the Government that the entry thereof would not constitute an admission that the Act had been violated.

On July 17, 1963, respondents and their corporation were indicted for the same acts of wrongdoing set forth in the civil action, referred to in the interrogatories, and enumerated in the criminal notices of hearing.

Respondents thereafter moved to quash the indictment and to suppress all evidence and leads obtained by the Government through the use of the interrogatories in the civil action, on the ground that the use of such evidence and leads constituted "an unconstitutional exercise of inquisitorial authority" and was abhorrent to, and violative of, fair and civilized standards of procedure in the administration of criminal justice. In the alternative, respondents moved for a hearing to determine the date on which the Government had decided to initiate the criminal prosecution (App. 46, 53).

The Trial Court denied the motion, but ordered a hearing to determine the Government's motive in instituting the civil action (App. 52).

At the hearing, it was developed that the civil case and the investigation of the criminal case had gone forward on a common front; that the investigation of the civil and criminal case were one and the same investigation and part of one file; and that everything obtained in the civil case was included in the criminal file and forwarded through Government channels for use in the criminal case (App. 115-116).

Moreover, it was learned that it was the practice and policy of the Food & Drug Administration, as a matter of routine, to obtain information in a civil case for use in a criminal case (App. 146-147). It was further learned that the initial recommendation for criminal prosecution was not made until after the District Judge had ordered answers to the interrogatories and had denied the motion to stay the civil action or to enlarge the time to answer (App. 162).

The hearing further established, as above noted, that the answers to the interrogatories had been filed on September 5, 1961 (App. 165), and that on September 22, 1961, Food & Drug Administration officer Randolph, who had handled the criminal prosecution, requested a copy of the defendants' answers to the interrogatories, and was sent same on September 25, 1961 (App. 174).

On October 18, 1961, Randolph recommended that respondents be indicted (App. 237). Randolph had direct responsibility for the prosecution of the civil case (App. 176), and had prepared the interrogatories at the very time that he was contemplating the issuance of a recommendation of criminal prosecution (App. 223-224). In fact, Randolph forwarded the answers to the interrogatories and all other papers in the civil case to the office of the Food & Drug Administration General Counsel to assist them in preparing the proposed indictment (App. 239). The indictment was prepared by the General Counsel's office and was identical to the indictment returned by the Grand Jury. The record further shows that additional notices of intention to prosecute respondents were sent at Randolph's recommendation after the answers to the interrogatories had been received (App. 237-239).

The record thus contains overwhelming proof, undenied in the Government's brief, of a complete commingling of the civil and criminal cases, and the use of the interrogatories and answers thereto in investigating the criminal offense and determining whether to prosecute.

As to whether the information obtained by the interrogatories was in fact used, the record is likewise clearly beyond peradventure of doubt that the information assisted in the investigation, presentation and prosecution of the present indictment.

One Government agent testified that because of the District Judge's order requiring answers to the interroga-

tories, the Government would have no difficulty in establishing the element of interstate commerce for one of the products involved in the criminal case (App. 143).

Another Government agent testified that he had used the answers to the interrogatories to prepare his testimony before the Grand Jury; that he had entered the grand jury room armed with the proposed indictment which had been prepared by his Food & Drug Administration associate, who also prepared the interrogatories, received the answers and recommended the indictment (App. 196-198). Further, a Government agent testified that it was the routine practice for the Food & Drug Administration to use discovery in a civil case to obtain evidence for a criminal prosecution (App. 146-147).

The Opinions Below

A. The Court of Appeals Decision

The Court of Appeals reversed respondents' convictions, holding that the Government may not maneuver individuals into a situation whereby it obtains and uses evidence against them in a criminal case "which has been coerced from (them) under penalty of either giving the evidence or suffering a forfeiture of (their) property" (App. 370).

The record amply supports the factual predicates for the holding by the Court of Appeals which made the following findings of fact:

1. The civil case and investigation of the criminal case had gone forward on a common front. Information obtained in the civil case was transmitted to those in charge of the criminal investigation; the civil and criminal cases were part of one file, and indeed, recommendation for criminal prosecution was not made until after the District

Judge had ordered the interrogatories to be answered in the civil case. The interrogatories were prepared by Mr. Randolph of the Food and Drug administration in Washington, D. C., who initially recommended the criminal action against the respondents. The answers to the interrogatories were sent to Randolph, and the indictment was prepared in Randolph's office (App. 365).

2. The interrogatories, while nominally directed to respondents' corporation, were for the most part, requests for admissions by, and information about, the respondents. Many of the interrogatories required answers revealing Kordel's activities, speeches and representations then under scrutiny in the contemplated criminal action (App. 368).

3. The interrogatories submitted by the Government were broader than would ordinarily be needed in a civil case and "were specifically directed toward the activities of Lelord Kordel," president of the corporation and principal defendant in the case (App. 369).

4. The corporation "was merely the corporate device through which respondent Kordel sold his products", and the Government had "wanted to cut through the facade and get at Kordel who was the president and dominant personality in the corporation", apparently a major stockholder, and, as such, "had financial interest in the seized property, and certainly, as president of the corporation, had participated in the decision to answer the interrogatories" (App. 369-370).

5. The evidence and leads obtained by reason of the interrogatories were used against the respondents in the criminal case (App. 369).

The Court of Appeals concluded from the aforementioned facts and applicable precedents, that respondents

had been required to supply incriminating information about themselves through civil discovery, under penalty of suffering a forfeiture of their property, and, consequently, had been compelled to be witnesses against themselves within the meaning of the Fifth Amendment; that, in effect, they had been subjected to the equivalent of an unreasonable search and seizure within the meaning of the Fourth Amendment; and had been the victims of extraordinarily unfair inquisitorial tactics on the Government's part.

B. The Decision of the District Court

The Trial Court, while ultimately denying respondents' motion to suppress after a hearing inquiring into the Government's motives in filing the interrogatories (App. 284-288), made observations of fact and law in its initial opinion wholly consistent with those of the Court of Appeals.

Thus, in its initial opinion, the Trial Court (as did the Court of Appeals) drew attention to *Boyd* v. *United States,* 116, U. S. 616 (1886), noting that while the precise holding in *Boyd* may have been limited to the compulsory production of private books and papers of an individual, rather than of a corporation's goods sought to be forfeited, other language in *Boyd,* "suggests that the holding was placed on a broader basis than the Fourth Amendment and would also apply to bar the use in evidence in a criminal action of compelled discovery of admissions in a civil action concerning the same transaction" (App. 54). The Trial Court further noted that the information obtained by the interrogatories in the civil case was not confined to information obtainable from corporate books and records which were subject to subpoena, but called for *admissions.* "As such," said the Trial Court, "they constituted 'a discovery which might tend to convict the party of a crime and compulsory discovery by extorting the party's oath' " (App. 54).

Summary of Argument

The Government's argument is based upon an erroneous reading of, and over-reaction to, the Court of Appeals' decision. The Court of Appeals, contrary to the Government's suggestion, did not adopt a *per se* rule automatically granting immunity to individual officers of a corporation, where the Government presents a civil suit against a corporation and uses the normal processes of civil discovery (Gov't. Br., pp. 16, 25). The Court of Appeals made it perfectly clear that there was no immunity involved and that the Government could file criminal proceedings against the same persons on the same charges that are involved in a civil case. The Court of Appeals merely held, that where the Government has maneuvered an individual into a situation in a civil case where he is faced with a choice of answering interrogatories and thereby incriminating himself in a contemplated criminal case, or suffering a forfeiture of his corporate property, the evidence and leads obtained by discovery must be suppressed.

No immunity was granted, the indictment was not dismissed, and the Government was merely relegated to proving its criminal case without the benefit of the admissions, evidence or leads obtained from the interrogatories—a task which should present no real difficulty to the Government, if, as the Government claims throughout its brief, it had obtained all of the evidence and answers necessary to prosecute respondents through independent investigation.

1. The Government argues that respondents were under no compulsion to supply incriminating information, because the interrogatories were directed to the corporation, whose duty under F. R. Civ. P. 33, was to appoint an officer or agent to answer the interrogatories who could,

without fear of self-incrimination, furnish such requested information as was available to the corporation.

The argument is one of form rather than substance. It is settled that corporate officers, by assuming the duties of their office are not deprived of their privilege against self-incrimination, and cannot be compelled to give oral or written testimony, or do any act (except produce corporate books and records of which they are custodians) which may incriminate them.

The corporation, as an incorporeal entity could provide information or perform physical acts only through human individuals. Therefore, when the Government argues that it was the corporation's obligation to appoint an agent to provide the information available to the corporation, it is in reality suggesting that respondents should have first appointed an agent in behalf of the corporation and then furnished him with information concerning their personal activities, which respondents would have been privileged to withhold in the first place. This two-step incrimination is forbidden by the Constitution.

Significantly, the interrogatories called for information which could only have been provided by respondents, since the interrogatories, for the most part, were requests for admissions concerning respondents' personal activities. As such, the corporation could not provide the information available to it without requiring respondents to make admissions concerning their individual activities—admissions which they were privileged to withhold.

The Government recognizes that the record does not contain any evidence that other persons were available to answer the interrogatories, but argues that respondents' attorneys should have answered the interrogatories, and that in any event respondents have the burden to show the inability of any other person to answer the interrogatories.

We disagree with both contentions. In the first place, if the privilege of self-incrimination means anything, it must mean that an accused cannot be required to designate his attorney to provide information which the accused himself would have the privilege to withhold under the Fifth Amendment. It would be a strange doctrine when an attorney, to avoid forfeiture of property, must answer interrogatories and thus incriminate his own client.

The burden of proving the availability of another agent to answer the interrogatories should be upon the Government. The Act involved herein imposes broad criminal liability on all persons having responsibility for shipment of misbranded drugs, regardless of incorporeal or proprietary relationships. To require respondents to make a showing as to the non-availability of another agent, or to prove that the corporate agent has provided all of the information available to the corporation, would in all likelihood require respondents to waive their privilege, and testify either as to their efforts to find a volunteer, or as to the information actually available.

2. The Government argues that respondents were under no compulsion to answer, because only corporate property was at stake in the event of a default for failure to answer.

However, as was pointed out by the Court of Appeals, the corporation was merely the device through which respondent Kordel sold his products, and the Government itself had sought to cut through the corporate facade to get at Kordel, the president, dominant personality, and apparent major stockholder of the corporation. Under these circumstances, Kordel's financial interest in the seized property was adequate for purposes of the Fifth Amendment, even if he was not the technical legal owner of the goods.

As will be subsequently shown herein, the Federal Food, Drug and Cosmetic Act is not concerned with proprietary or corporeal relationships, but with the shipment of misbranded drugs. The corporate veil has been effectively pierced to impose criminal liability under that Act. Its breach should not be repaired so as to deny the target of a criminal investigation his privilege against self-incrimination.

3. Apart from the Fifth Amendment, the Government's tactics here transcended fair and reasonable standards of criminal justice. Civil and criminal functions were totally commingled so that respondents were whipsawed into a completely inescapable position. They were either required to provide incriminating information at the very time that a criminal case was being planned against them, or suffer forfeiture of their corporate property.

There is here involved a shocking example of agency indifference to abusive inquisitorial authority and a misuse of the discovery procedures available under the Federal Rules of Civil Procedure. The holding and rationale of the Court of Appeals is fulsomely supported by the record and is entirely consistent with the holdings of this Court, recognizing and invoking exclusionary rules where the evidence has been obtained in violation of an accused's constitutional rights; or where the Court's supervisory authority is necessary to prevent the exercise of the Government's inquisitorial authority in a manner which is abhorrent to fair and civilized standards and procedures in the administration of criminal justice. *McNabb* v. *United States* 318 U. S. 332, 340-343 (1942); *Rea* v. *United States*, 350 U. S. 214 216-217 (1955).

Argument

The Government asserts that even though the interrogatories sought detailed information and admissions as to the respondents' individual activities, respondents nevertheless, were under no compulsion to answer the interrogatories because the interrogatories were nominally addressed to their corporation whose duty it was to appoint an agent—even respondents' attorney—who could, without fear of self-incrimination, furnish such requested information and admissions as was available to the corporation.

The Government further asserts, that regardless of respondents' financial relationship to their closed corporation, there was no compulsion on respondents stemming from the fact that a failure to answer the interrogatories might result in a forfeiture of their property, because technically, the articles under seizure were the property of the corporation and not respondents as stockholders.

We disagree with both contentions and submit that the Government's position is based upon a mechanical, unrealistic and highly impersonal application of the corporate entity theory, without regard to respondents' interests as represented by their Fifth Amendment privilege; the extraordinarily unfair tactics employed by the Government in this case to "get at" respondents through their corporation; or the unique statute under which respondents were indicted. In effect, the Government's contention is that it may cut through the corporate veil in its interrogatories "to get at" respondents, and then may repair the breach to deny respondents their Fifth Amendment privilege and right of due process.

We further submit that the Government has over-reacted to the holding of the Court of Appeals and the factual predicates therefor.

A. The Court of Appeals Did Not Limit the Use of Interrogatories in a Civil Case, or Confer Immunity Upon Respondents.

It should be emphasized at the outset, that the Court of Appeals did not hold that a Government agency may not utilize interrogatories in a civil *in rem* action against a corporation and thereafter commence a criminal prosecution for the same alleged illegal activities. Indeed, the Court of Appeals specifically noted that it was not so holding (App. 370), and further noted that its holding was *limited* to the proposition that the Government may not *use* evidence or leads against a defendant in a criminal case which had been obtained by compulsory interrogatories nominally directed to a defendant's closed corporation, where the defendant is the target of the criminal case, under penalty of either providing the information or suffering a forfeiture of his property in the corporation.

The Court of Appeals thus merely held that under the outrageous facts of the instant case, the Food and Drug Administration had obtained admissions, evidence and leads not otherwise available in a criminal case, to investigate, commence and prosecute a criminal action; and that such evidence, leads and admissions, while available for use in the civil case, should have been suppressed in the criminal case.

Nor did the Court of Appeals hold, as the Government suggests, that the use of interrogatories directed to a corporation in a civil case confers immunity from prosecution for the misdeeds of the individual officers of the corporation. The record is clear that the Court of Appeals did not dismiss the indictment, but merely remanded the case for a new trial. There is no immunity here involved—nor is the Government agency precluded from retrying respondents on the same charges that were involved in the civil case. See *United States* v. *Blue*, 384 U. S. 251 (1966).

B. Respondents Were Under Compulsion to Provide Incriminating Information Even Though the Interrogatories Were Nominally Directed to Their Corporation.

1.

The Government argues that "in no sense" were respondents compelled to incriminate themselves (Govt. Br., p. 16), because the interrogatories were directed to their corporation whose duty it was to select an agent—even respondents' attorney—who could, without fear of self-incrimination, furnish such information and admissions as was available to the corporation. The argument is one of form rather than substance.

It is well settled that a corporation cannot invoke the Fifth Amendment privilege. This, of course, does not mean that officers or agents of a corporation who are potentially subject to criminal responsibility must provide information, or do any act (except the production of corporate books and records of which they are custodians) which may incriminate them. Clearly, each corporate officer or agent could refuse to provide incriminating information claiming his Fifth Amendment privilege. *Curcio* v. *United States,* 354 U. S. 118, 123, 124 (1952); *Wilson* v. *United States,* 221 U. S. 361 (1911).

In the *Wilson* case, *supra,* this Court drew the distinction between the obligation of corporate officers to produce corporate records, and the officers' right to refuse to provide other information stating:

> "They [the custodians of corporate records] may decline to utter upon the witness stand a single self-criminating word. They may demand that any accusation against them individually be established without the aid of their oral testimony or the compulsory production by them of their private papers" (221 U. S. at 385).
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Similarly, in the *Curcio* case, *supra*, this Court again stated:

> "A custodian, by assuming the duties of his office undertakes the obligation to produce the books of which he is custodian, in response to a rightful exercise of the state's visitorial powers. But he cannot lawfully be compelled, in the absence of a grant of adequate immunity from prosecution, to condemn himself by his own oral testimony" (354 U. S. at 123, 124; *Shapiro* v. *United States*, 335 U. S. 1, 27).

And if he cannot be compelled to condemn himself by oral testimony, " . . . we do not see how compulsion in writing makes a difference for constitutional purposes". *Albertson* v. *Subversive Activities Control Board*, 382 U. S. 70, 78 (1965). Indeed, the privilege applies where incriminating information is sought by discovery in civil cases. *United States* v. *The Saline Bank*, 26 U. S. (1 Pet.) 100 (1858) *; *Boyd* v. *United States*, *supra*.

Further, with respect to the Fifth Amendment, a person is

> " . . . *protected 'from being compelled to disclose the circumstances of his offense, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained* or made effectual for his connection, without using his answers as direct admissions against him." *Counselman* v. *Hitchcock*, 142 U. S. 547, 585 (1892). (emphasis added).

If the disclosure of information by witnesses is of greater importance than the possibility of punishing them for some

* In the *Saline Bank* case, the duty of the bank, its cashier and stockholders to make any discovery in a civil case was suspended, where the facts required to be discovered would expose the parties to a danger of criminal penalties.

crime, Congress can "as in other cases, confer the power of unrestricted examination by providing complete immunity". *McCarthy* v. *Arndstein,* 266 U. S. 34, 42 (1924); *Brown* v. *Walker,* 161 U. S. 591 (1896).*

No statute which leaves a party subject to criminal proceedings if he provides or is compelled to provide incriminating information or leads, can over-ride the privilege conferred by the Fifth Amendment. *Counselman* v. *Hitchcock supra.*

As the gamut of this Court's decisions over the years so clearly demonstrates, this Court has breathed life and vitality into the privilege as it relates to all natural persons, regardless of their relationship to corporate entities; regardless of the form (oral, written or acts) in which the information is sought; or the forum (civil, administrative, investigatory, criminal) in which the privilege question may arise.

To require respondents, as officers of the corporation, to appoint an agent, and then supply that agent with the information necessary to answer the interrogatories, is to require them to incriminate themselves in two steps. As was stated by Judge Prettyman in his concurring opinion in *Communist Party of the United States* v. *United States,* 384 F. 2d 957, 969, (CADC, 1967):

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* Significantly, the Federal Food, Drug and Cosmetic Act contains no general immunity provisions. Section 703 of the Act, however (21 U. S. C. 373), does appear to strike a balance between the need to obtain certain information to enforce the provisions of the Act, and the rights of the individual to prevent information obtained from being used against him in a criminal prosecution. In the instant case, the Government argues the right to accomplish by interrogatories that which the legislative structure of the Act indicates it may not accomplish by compulsory investigation. The information sought and obtained by the civil interrogatories includes, at least in part, the type of information referred to in Section 703 of the Act as to which the person providing same would be entitled to have such information suppressed.

"This is two-step incrimination, but it seems to me that the person is incriminating himself just as effectively as if he himself handed the list to the Government; and he cannot be compelled to do it.

The same reasoning as that outlined in the preceding paragraph applies to the suggestion that the Party might hire an agent and pay him a fee to execute the registration. It might, of course, but our problem is whether it can be compelled to do so. It seems to me close to frivolous to suggest that a person protected by the Fifth Amendment can be compelled to hire an agent, furnish him with the means to instigate a criminal prosecution against him (the giver), and then authorize him (the agent) to do so.

I think the Government cannot compel people to incriminate themselves, either by testifying or by supplying documentary evidence, and either by themselves supplying an incriminatory document or by giving it to a volunteer or a hired agent to give to the Government. In short, I think a person cannot be compelled to incriminate himself, either directly by his own action or by a second-, third- or fourth-hand action through some complicated intermediary process." (Emphasis added.)

As the Court of Appeals observed, the interrogatories were for the most part requests for admissions by and information about Kordel. Many of the interrogatories required answers revealing Kordel's activities, speechs and representations then under scrutiny in the contemplated action (App. 368). As such, the corporation could not provide the information available to it without requiring Kordel to make admissions concerning his individual activities and supply information which only he would know and which he was privileged to withhold.

The Government's argument that the Fifth Amendment privilege is not available to respondents because they made no personal claim to the seized property, is likewise one of form and not substance. The same argument was made to, and rejected by, the Court of Appeals which expressly found (a) that the corporation was merely the corporate device through which Kordel sold his products, and (b) that the Government itself had sought to cut through the corporate facade to get to Kordel who was the president, dominate personality and apparently the major stockholder (App. 369-370). The Court of Appeals thus properly held that Kordel's financial interest in the seized property was as real, for purposes of the Fifth Amendment and due process, as if the seized property was owned by him in his individual capacity.

The Government's reliance upon *United States* v. *3963 bottles . . . Engergol,* 265 F. 2d 332 (C.A. 7) and *United States* v. *42 jars . . . BEE Royale Capsules,* 264 F. 2d 666 (C. A. 3) is misplaced. Neither of these cases deals with nor reaches the precise issue involved here, namely, whether incriminating evidence obtained by compulsory interrogatories nominally directed to a corporation but which primarily concerns the activities of the officers, should be suppressed in a parallel criminal case. Rather, in both cases, the issue presented was whether the corporation was obliged to appoint an agent to furnish general corporate information without fear of incriminating the agent. The existence of an "innocent" agent was assumed, and his ability to provide corporate information was likewise assumed.

Here, no such appointment can be made and no such assumptions can be indulged in. Under the extraordinary facts of the instant case, the Government itself sought to cut through the corporate facade to get from respondents, the targets of the criminal case, information which only they could have provided.

2.

The Government's reliance upon a strict application of the general principles of corporate law is misplaced. It ignores the fact that under the Federal Food, Drug and Cosmetic Act, the legal fiction between a corporation and its officers, stockholders or employees has been virtually abolished.

The Federal Food, Drug and Cosmetic Act is unique among federal statutes in the broad range of criminal liability in that it allows liability to be imposed upon responsible corporate officers and agents regardless of knowledge or intent. See *Morissette* v. *United States,* 342 U. S. 246 (1952).

Under this Act, criminal liability is vicarious in nature and is imposed without knowledge or consciousness of wrongdoing on the part of the agents of the corporation. Criminal stigma is placed upon a person "predicated wholly upon chance, without the necessity of fraud, participation, acquiescence or even negligence." *Vicarious Criminal Responsibility,* 19 Ind. L. Rev., 265, 268; *United States* v. *Dotterweich,* 320 U. S. 277, 64 S. Ct. 134, 88 L. Ed. 48 (1943).

It has been stated that the Federal Food, Drug and Cosmetic Drug Act is an example of a public welfare offense statute wherein the elimination of intent is justified on the ground of public welfare, necessity and expediency. Criminal sanctions are deemed justifiable in order to serve as an effective means of regulation.

As was stated by this Court in the *Morissette* case, *supra,* "Such dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare" 342 U. S. at 254.

The leading case on the subject of the criminal liability imposed upon the agents of a corporation under the Federal Food, Drug and Cosmetic Act, is *United States* v. *Dotterweich, supra.* In that case, this Court defined the liability of officers and agents of corporations engaged in manufacturing and distributing foods and drugs allegedly in violation of the Food and Drug Act. There, this Court held that public policy required strict criminal liability upon a general class of individuals identified with the corporation without regard to criminal intent or corporeal relationships, in order that the Food, Drug and Cosmetic Act might provide an effective means of regulation in a field involving public health and safety. In that case, this Court affirmed the conviction of the president of the corporation which had repacked and shipped misbranded and adulterated goods, even though the president personally had no knowledge of the operation and the defect in the goods was not apparent on its face. In so doing, this Court set a general standard for determining the personal liability of corporate agents, which is directly contrary to the Government's position in the instant case. Thus this Court stated:

> "The Act is concerned not with the *proprietary relation to a misbranded or adulterated drug, but with its distribution.* In the case of a corporation, such distribution must be accomplished, and may be furthered, by persons standing in various relations to the incorporeal proprietor. . . . To speak with technical accuracy, under §301, a corporation may commit an offense and all persons who aid and abet its commission are equally guilty. Whether an accused shares responsibility in the business process resulting in unlawful distribution depends on the evidence produced at the trial and its submission—assuming the evidence warrants it—to the jury under appropriate guidance. The offense

> is committed . . . by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, to put into the stream of interstate commerce, adulterated or misbranded drugs." 320 U. S. at 283, 284 (emphasis added).

The Federal Food, Drug and Cosmetic Act thus virtually automatically imposes criminal liability on a broad class of persons who have responsibility for the distribution of the products involved, without regard to technical incorporeal or proprietary relationships where corporations are involved. The mere fact that corporate personnel have some responsibility for distributing the violative product is sufficient, regardless of knowledge or an awareness of any violative conduct. *United States* v. *Dotterweich, supra, Lelles* v. *United States,* 241 F. 2d 21, 24 (9th Cir. 1957); *United States* v. *Kaadt,* 171 F. 2d 600, 604 (7th Cir. 1949); *United States* v. *Parfait Powder Puff Co.,* 163 F. 2d 1008, 1009 (7th Cir. 1947).

It is submitted that under the special circumstances of the Federal Food, Drug and Cosmetic Act, the Government, in the instant case, has placed undue emphasis upon the existence of the corporation. Indeed, the argument of the Government in the instant case, is directly contrary to its position urged in the *Dotterweich* case, wherein the Government successfully argued to this Court that the Federal Food, Drug & Cosmetic Act has intentionally chosen to ignore the corporation's structure as a legal entity, and, instead, imposes criminal liability upon all officers, agents and corporation personnel who knowingly share responsibility in the business process which results in the distribution of misbranded or adulterated drugs. In reality, under the Food and Drug Act, even a nominal officer or agent may share in the responsibility for a

products' distribution, and thus be criminally liable without intent. To state it simply, in order to provide an effective enforcement of the Federal Food, Drug & Cosmetic Act this Court has chosen to pierce the corporate veil. The Government now requests that this Court reestablish this veil and adhere to formal legal fictions to deny corporate officers their privilege against self-incrimination.

Respondents do not ask this court to establish new dimensions in corporate or constitutional law. The statute involved has already destroyed the distinction between the corporation and its officers when imposing criminal liability. If the statute imposes liability upon officers, agents and employees without regard to knowledge or intent of the offense, no reason exists why the officers, agents or employees of the corporation may not invoke their Fifth Amendment privilege to avoid self-incrimination where the interrogatories are nominally directed to their corporation and concern the activities of the individuals.

The purpose of the Fifth Amendment is to protect the individual against the potential evils of compulsory disclosure. Here, the corporation and the responsible agents of the corporation are, in essence, one and the same and have been treated as such by the very statute which the Government invoked in bringing criminal action against the corporation and the respondents. The protection afforded by the Fifth Amendment transcends any difficulties that the granting of the privilege to its agents would impose in the prosecution of criminals under the Food and Drug Act.

Obstacles to the application of the Fifth Amendment privilege, which is founded upon "the high sentiment and regard our jurisprudence for conducting criminal trials

and investigatory proceedings upon a plane of dignity, humanity and impartiality" (*United States* v. *White,* 322 U. S. 694, 698 (1943), should not be lightly placed in its path.

Any agent who could answer the interrogatories here involved subjects that agent to a "real and appreciable" risk of self-incrimination under the Food and Drug Act. *Cf., Marchetti* v. *United States,* 390 U. S. 39, 48 (1968). The fact that in "uncommon" instances, the agent answering the interrogatories may not be incriminated, is no reason to deny the privilege. *Haynes* v. *United States,* 390 U. S. 85, 96-97, 99 (1968). The class of persons associated with the corporation who would have, or who could obtain, the information sought by the broad interrogatories here involved, constitute "a select group inherently suspect of criminal activities" under the *Dotterweich* rule. For any such person to answer the interrogatories would have requried that person unmistakeably to identify himself as a member of this select and suspect group, and thus to create a "real and appreciable" hazard of incrimination. *Cf, Leary* v. *United States,* — U. S. — 23 L. ed. (2) 57, 71 (1969).

3.

The Government argues that the burden of proving the non-availability of an agent willing to act for the corporation in answering the interrogatories is upon the respondents. Respondents submit that in view of the fact that the Act involved herein imposes criminal liability on all persons having responsibility for the shipment of misbranded articles, regardless of their corporeal relationships, the burden of proof as to the availability of "innocent agents" should be upon the Government. To require the corporation (and hence respondents) to make a showing as to the non-availability of an agent to sign the interrogatories, or to establish that all the information available to the cor-

poration was in fact submitted, would in all likelihood require respondents, as sole officers, to waive their privilege and testify either as to their efforts to find a volunteer or as to the information actually available. *Cf., Communist Party* v. *United States,* 331 F. 2d 807, 814 (CADC, 1963).

4.

The Government asserts that respondents' claim of privilege was waived because it was not specifically referred to in the original motion for a protective order in the civil case. Here, again, the Government relies upon form rather than substance.

Quite clearly, the dilemma confronting respondents in being required to provide information responsive to the interrogatories, albeit through their corporation, was specifically emphasized to the District Judge in the civil case. As above noted, a motion for a stay of the case, or an extension of time to answer the interrogatories pending the disposition of the threatened criminal case, was duly filed.

Moreover, on the motion to suppress the evidence and leads before the Trial Court in the instant case, the claim of privilege was specifically asserted.* In this connection, the Trial Court's first opinion on respondents' motion to suppress, specifically acknowledged that respondents had claimed "that the use of the evidence obtained in the civil case violates the Fifth Amendment privilege against self-incrimination" as well as the Fourth Amendment right

* On the written motion, respondents asserted that the use of evidence and leads obtained by compulsory discovery proceedings in the civil case constituted an unconstitutional exercise of inquisitorial authority and violated respondents' rights to a fair trial (App. 46). Counsel's supporting affidavit refers to the Government's tactics as requiring "respondents to give evidence against themselves" (App. 50). Finally, on oral argument, counsel again specifically urged that respondents had been whip-sawed into providing incriminating information (App. 26).

against the use of evidence obtained by unreasonable search and seizure (App. 53).

We submit that under all of the circumstances of this case, respondents' failure to rely specifically upon the Fifth Amendment on the motion for a protective order in the civil case does not amount to a waiver of their privilege. *Cf., Leary* v. *United States,* — U. S. —, 23 L. ed. (2) 57, 77 (1969).

C. The Procedures Used by the Government Were Inherently Unfair and Violative of Respondents' Rights of Due Process.

Quite apart from Fifth Amendment considerations, the F. D. A. must be held to have utilized civil discovery to an impermissible extent in this case. The investigation of the criminal case and civil discovery went forward on a common front, and the discovery, while nominally directed to respondents' corporation, was employed to obtain evidence, leads and admissions concerning respondents' activities directly relevant to the criminal case. Under these circumstances, an exclusionary rule against the use of the evidence and leads should have been invoked in the exercise of the Federal Court's supervisory authority over the fair administration of criminal justice. *McNabb* v. *United States,* 318 U. S. 332, 340-343 (1942); *Rea* v. *United States,* 350 U. S. 214 (1956); *United States* v. *Thayer,* 214 F. Supp. 929 (D. Colo., 1963); *United States* v. *Parrott,* 248 F. Supp. 196 (DC, 1965); F. R. Cr. P. 41(e).

As was stated in *United States* v. *Thayer, supra,* the question of using evidence obtained in a civil proceeding concerning a person who is the object of a possible criminal action, is

> "somewhat broader than possible violation of defendant's privilege of self-incrimination and that the issue is also whether the methods employed in

obtaining and reducing this testimony shows unfairness which, quite apart from the prohibitions of the Fifth Amendment, render the evidence so obtained inadmissable." *Id* at 930.

Respondents submit that the instant case presents overriding and compelling considerations, founded upon sound public policy and substantial justice, for suppressing evidence and leads obtained by compulsory discovery nominally directed to a corporation, but designed to elicit information against the officers at the very time that a criminal action is threatened against those officers. Indeed, numerous cases hold that even under less compelling circumstances, the requirement to make discovery should be postponed until after the disposition of the criminal case, *United States* v. *Lipschitz,* 132 F. Supp. 514 (EDNY 1955); *United States* v. *Bridges,* 86 F. Supp. 931 (N. D. Cal., 1949); *United States* v. *A. B. Dick Co.,* 7 FRD 442; *United States* v. *Linen Supply Institute of Greater New York,* 18 FRD 452 (SDNY); *Paul Harrigan and Sons* v. *Enterprise Animal Oil Co., Inc.,* 18 FR Serv. 33.325 Case 1 (EDPA, 1953); *Penn* v. *Automobile Insurance Co.,* 27 F. Supp. 336 (Ore., 1930). If discovery has been made, at the very least, the evidence obtained therefrom should be suppressed in the companion or parallel criminal case. *Blue* v. *United States, supra; Boyd* v. *United States, supra; The Saline Bank, supra.*

These cases are founded upon public policy, rooted in historical and settled concepts of anglo-saxon criminal jurisprudence that a defendant or prospective defendant should not be required to disclose evidence to sustain the prosecution against him in a criminal case or his evidence of defense. This is not solely a matter of privilege against self-incrimination, but rather it is an expression of the policy and principles of a free Government which, in criminal cases, opposes inquisitorial procedures. *United States* v. *Boyd, supra,* at 632.

Here, there is involved a shocking example of agency indifference to abusive inquisitorial authority which the government has chosen to minimize if not ignore.

The critical facts upon which the reversal by the Court of Appeals of respondents' convictions rested, were that the civil case and the investigation of the criminal case had gone forward on a common front. Information obtained in the civil case was transmitted to those in charge of the criminal investigation. The initial recommendation for criminal prosecution had not been made until after the District Judge had ordered the interrogatories, which were far broader than would ordinarily be needed in a civil case, to be answered in the civil case. The recommendation to indict respondents was not made until after the answers were received. The interrogatories had been prepared by Mr. Randolph of the Food and Drug Administration in Washington, who also made the decisions to recommend criminal action against the respondents. The answers to the interrogatories had been sent to Mr. Randolph and the indictment was prepared in Mr. Randolph's office.

In short, in this case there was a complete commingling of functions between the person preparing the interrogatories and the person responsible for investigating the criminal case and recommending criminal prosecution—indeed, they were one and the same person.

The government acknowledges that the existence of parallel civil and criminal proceedings "imposes delicate problems" (Pet. Br., p. 25) which require great "care" to protect a prospective defendant against unfair inquisitorial tactics. It argues, however, that there was no unfairness in this case because the civil action was necessary to protect the public and bring the suit promptly to judgment so that the FDA could invoke multiple seizures under 21 U. S. C. 334 to prevent the marketing of additional quantities of the mis-branded articles (Pet. Br., p. 14).

The Government's contention, however, overlooks its own rationale, on page 33 of its brief, that civil proceedings should not go forward where a criminal action is threatened, if the public interest can be protected by means of interim relief, such as a preliminary injunction, which is available, for example, in securities fraud cases.

The fact is that interim injunctive relief to immediately protect the public interest is also available under the Federal Food, Drug and Cosmetic Act. See 21 U. S. C. 332. In the instant case, no injunctive relief, interim or otherwise, was ever sought, from the moment the civil case was filed in June 1960, until the case was terminated by a consent judgment in November, 1962. During that period, the Government did nothing to prevent the marketing of additional articles, and its sole action was to press relentlessly forward to obtain answers to the more than 2,000 questions contained in its interrogatories, while at the same time moving forward with its plans to indict respondents.

Nor did the Government invoke multiple seizures after the entry of the consent judgment.* Indeed, the consent judgment contained a specific provision authorizing the alleged mis-branded articles to be re-labelled so that these same articles could be resold to the public. Clearly therefore, the case involved no threat whatever to the safety and health of the public from the continued sale of the products, but merely involved a technical question as to whether Kordel's lectures and personal writings had served to mis-brand the articles.

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* Multiple seizures are also permitted without a prior judgment where the Secretary of the Department of Health Education and Welfare determines the need to safeguard the public interest. No such determination was made and none was sought. The situation therefore, could not have been deemed "critical", and could hardly have justified the Government's mis-use of discovery proceedings in the instant case.

Moreover, it is not with significance to note that the consent decree which terminated the civil action, contained an exculpatory provision by which the Government acknowledged that its entry would not constitute an admission that the Federal Food, Drug and Cosmetic Act had been violated. Yet, by utilizing the evidence and leads in the preparation and prosecution of the criminal case based upon the identical acts of wrongdoing, the Government accomplished precisely that which it said was not to be implied by the consent decree.

The Government's claim that it needed the answers to the interrogatories to prepare the groundwork for summary judgment and that it acted in good faith, stands on no better footing. The fact is, as above noted, that a motion for summary judgment was never made. This failure would appear to negate the Government's claim that it was already in possession of all of the information necessary, without the need for interrogatories, to succeed in the civil case, let alone the criminal case.

Further, the rule urged by the Government that evidence obtained under the circumstances of the instant case may be used in a criminal prosecution, merely because one of the purposes for its acquisition may be to lay a foundation for summary judgment, is replete with substantial possibilities of abuse. The filing of a civil suit is a commonplace and simple procedure for the law enforcement section of the FDA to pursue. An inquiry into the *bona fides* of such a suit invites fruitless litigation into official motives and official purposes. See, *Abel* v. *United States,* 362 U. S. 217, 254, 255 (1960) (dissenting opinion). It must be recognized that the power to commence a civil suit upon the mere filing of a complaint "is so unconfined by any safeguards that it cannot be countenanced as consistent with the Fourth Amendment", *Abel* v. *United States, supra,* at 254 (dissenting opinion) par-

ticularly, where, as here, compulsory admissions and evidence of essential elements were sought at the same time that a criminal case was contemplated.

Here, while the answers to the Government's interrogatories was required by the District Judge in the civil case, the order to answer the interrogatories was entered in reliance upon the Government's representation that formal criminal proceedings, while under consideration, had not yet been, and might never be, instituted. Such a contention, while perhaps justifying the District Judge's order requiring the filing of answers to the Government's interrogatories, does not justify *the use* of such answers in the criminal case. Such logic would allow the Government to utilize civil discovery to obtain evidence in all criminal cases. If such evidence is adequate to sustain the criminal case, the criminal case will be brought. If such evidence is inadequate, then of course, formal criminal proceedings might not ever be instituted. The compelling facts here, however, are that at the very time that the civil case was pending and interrogatories served, the FDA had under consideration the bringing of a criminal case for the identical offense and the answers to interrogatories filed in the Court were at Randolph's request, forwarded to him. Randolph handled the criminal prosecution and recommended that respondents be prosecuted.

The Government further argues that the Court of Appeals laid down a *per se* rule against the bringing of parallel civil and criminal proceedings, and thus has unduly hampered the work of many agencies. The Court of Appeals did not hold, and respondents do not contend, that agencies may not institute and prosecute civil proceedings on offenses that may also involve a possible criminal proceeding against the same person. Rather, what is involved here is a Government search for criminal acts committed by officers of a corporation conducted under the guise of discovery pro-

cedures nominally directed to their corporation, and undertaken for ostensible civil purposes. Even under such circumstances, respondents do not contend that the civil case may not go forward, if necessary to protect the public interest, and discovery filed. Respondents submit only that the evidence obtained by such discovery should be suppressed in a criminal case simultaneously threatened or pending at the time the discovery is sought and where the same person is in charge of both cases, to prevent the use of inquisitorial procedures which are abhorrent to civilized standards of criminal justice. In fact, even under less compelling facts, this is precisely the remedy suggested by this Court in *Blue* v. *United States*, 384 U. S. 251 (1966). See also, *United States* v. *Thayer, supra, United States* v. *Parrott, supra.*

Petitioner argues that all of the evidence used in preparing and prosecuting the criminal case was obtained by independent investigation and that evidence and leads obtained by the interrogatories were not used. The same argument was made to, and rejected by, the Court of Appeals, which stated as follows:

> "We find no tangible support in the record for this statement. It is admitted by Mr. Fowler, the Government agent on whose testimony the indictment was returned—he was the only witness who appeared before the grand jury, that he used the answers to the interrogatories in preparing his testimony before the grand jury. There is no showing by the Government that any attempt was made at any stage of the proceedings to separate the two cases. There is no testimony or avowal by those who investigated and prosecuted the criminal case that they failed to use evidence and leads obtained through answers to the interrogatories. It is admitted by the Government witnesses that in the

enforcement of the Federal Food, Drug and Cosmetic Act it is not unusual for the Government first to commence a civil action and then use information obtained in that case in parallel criminal proceedings. Information obtained from whatever source is placed in one general file. We note, too, that the interrogatories submitted by the Government were broader than would ordinarily be needed in a civil case. Some of the interrogatories were directed specifically toward the activities of Lelord Kordel, president of Detroit Vital Food, Inc., and the principal defendant in this case. We conclude from this record that evidence and leads obtained by reason of the interrogatories were used against the defendants in the criminal case" (App. 368, 369).

We further submit, that if, as the Government asserts, its evidence was obtained by independent investigation, respondents can be retried without too much difficulty.

D. The Cases Cited by the Government are Inapposite.

The reliance by the Government upon *United States* v. *Simon,* 373 F. 2d 649 (C. A. 2) is misplaced. In that case, in contrast to the instant case, the Court of Appeals expressly noted the absence of any "consultation on lines of questioning" between the person responsible for handling the civil case and the person responsible for the criminal case. 373 F. 2d at 652.

The Government's reliance upon *United States* v. *Parrott,* No. 66 Cr. 243 (S. D. N. Y., Feb. 14 1969), is likewise misplaced. In that case, discovery was utilized by the agency at a time when no consideration of criminal prosecution against the defendant had been given. In the case at bar, however, not only was the Government considering

criminal prosecution of the defendants at the same time that discovery was utilized in the civil case, but the very same person handled both.

United States v. *Sclafani,* 265 F. 2d 408 (C. A. 2, 1959) is inapposite. In that case, agents of the Internal Revenue Service requested permission to examine records of a taxpayer in a routine audit. The taxpayer voluntarily turned over his books. The IRS request was not a ruse to deceive the taxpayer, nor was the taxpayer subjected to a compulsory order of production which would result in a forefeiture of property upon refusal.

United States v. *Light,* 394 F. 2d 908, (C. A. 2, 1968) merely involved a consent to the delivery of public books and records which were required to be kept under the Securities and Exchange Act. No forfeiture of property was involved, nor was there any attempt to obtain information or admissions as to the personal activities of officers of a corporation under the guise of interrogatories nominally directed to the corporation.

United States v. *Squeri,* 398 F. 2d 785 (C. A. 2 1968), merely involves the voluntary appearance of a defendant and his accountant before the Internal Revenue Service where he voluntarily made numerous admissions which were subsequently used against him in a criminal proceeding.

Finally, *United States* v. *Jaskiewicz,* 278 F. Supp. 525 (E. D. P. A. 1968) and *Silver* v. *McCamey,* 221 F. 2d 873 (CADC, 1955) cited by the Government (Pet. Br. 33), actually support respondents' position. In both cases, the point is made that criminal and civil proceedings should not even be simultaneously considered where there is no immediate threat to the public. As above noted, no immediate threat was involved in the instant case.

Respondents respectfully submit, that on the record of the instant case, and the unusual circumstances here pre-

sented, the Court of Appeals correctly concluded that the evidence and leads obtained by compulsory discovery were designed to "get at" respondents and should have been suppressed in the parallel criminal case against respondents. The tactics used by the government were inherently unfair.

If ever there was a case where the District Court had in fact decreed a discovery which provided evidence of a criminal offense, this is such a case. If ever there was a case where a compulsory discovery was utilized with knowledge, intent and design that it be used to provide evidence of a criminal offense, this is such a case. If ever there was a case where the fair administration of criminal justice, not to speak of the Fourth and Fifth Amendments, cries out desperately for the application of an exclusionary rule, this is such a case.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be affirmed. If this honorable Court determines otherwise, the case should be remanded to the Court of Appeals to consider the other grounds of assigned error argued to that Court but apparently not passed upon by it (App. 364).

Respectfully submitted,

SOLOMON H. FRIEND
Attorney for Respondents.

On the Brief,
SHELDON S. LUSTIGMAN

October, 1969.

Appendix A to Brief of Respondent

NOTICE OF HEARING

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
FOOD AND DRUG ADMINISTRATION
1560 E. Jefferson Ave., Detroit 7, Mich.

In reply refer to
Sample Numbers 21-129 R et al
Health Foods

January 19, 1961

Detroit Vital Foods Inc., and
Lelord Kordel, and
Alfred J. Feldten
20731 W. 7 Mile Rd.
Detroit, Michigan

Gentlemen:

Investigation by this Administration indicates your responsibility for violation of the Federal Food, Drug, and Cosmetic Act, as described in the attached Charge Sheet, with respect to the following:

Consignment of articles of drugs labeled in part:

21-129 R

"Vitamins—Minerals Nutri-Time A Dietary Food Supplement 90 Tablets", shipped by Kapco Inc. Kalamazoo, Michigan to Detroit Vital Foods Inc., Detroit, Michigan prior to March 29, 1960. The article was manufactured by Kapco Inc. from ingredients which had been, in part, received in interstate commerce.

Appendix A

21-131 R

"Vital Foods * * * 100 Whey-Plus Tablets", shipped by Kapco Inc., Kalamazoo, Mich. to Detroit Vital Foods Inc., Detroit, Michigan prior to March 30, 1960. The article had been compounded by Kapco Inc., from ingredients which were, in part, received from interstate sources.

21-132 R,
21-145/6 R.

"Lelord Kordel's (or Vital Foods Special Brand) 'Frutex' Fruit Salad Natural Organic Vitamin C Wafers", shipped by Savoy Drug & Chemical Co. Chicago, Illinois to Detroit Vital Foods Inc., Detroit, Michigan on or about 1/12/60, 3/4/60, 3/25/60 and 3/28/60.

21-133 R,
21-144 R

"Mich. Brand Korleen Tablets", shipped by Freshman Vitamin Co. Oak Park, Michigan to Detroit Vital Foods Inc., Detroit, Michigan, on or about March 1, 1960. The article had been manufactured from active raw ingredients received in interstate commerce.

21-134 R

"Lelord Kordel's 100% Natural and Organic Super Protein Aminex", shipped by Savoy Drug & Chemical Co., Chicago, Illinois to Detroit Vital Foods Inc., Detroit, Michigan, on or about March 18, 1960.

21-136 R,
21-147 R

"Michigan Brand of A-Ribo Tablets", shipped by Kapco Inc., Kalamazoo, Michigan to Detroit Vital

Appendix A

Foods Inc., Detroit, Michigan prior to 4/4/60. The articles had been manufactured by Kapco Inc. from active raw ingredients received from interstate sources.

21-141 R

"Vital Foods Special Brand Lecigen Lecithin Granules", shipped by Savoy Drug & Chemical Co. Chicago, Illinois to Detroit Vital Foods Inc., Detroit, Michigan, on or about February 26, 1960.

An informal hearing will be held on Wednesday, February 1, 1961, at 2:00 p.m. (EST) at 1560 E. Jefferson Ave., Det. 7, Mich. to give you an opportunity to present your views in the matter. The enclosed Information Sheet explains the purpose and nature of the hearing, and how you may reply. If no response is received on or before the date set, our decision on whether to refer the matter to the Department of Justice for prosecution will be based on the evidence at hand.

By direction of the Secretary of the Department of Health, Education, and Welfare:

GEO. T. DAUGHTERS
Geo. T. Daughters
Chief of District

Enclosures

Legal Status Sheet
Charge Sheet
Information Sheet

(Important: Note All Enclosures Carefully)

cc: Lelord Kordel, and Alfred J. Feldten, w/cc Charge Sheets & Info Sheet

Appendix A

Prohibited Act:

Section 301(k) of the Federal Food, Drug, and Cosmetic Act. The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being misbranded or adulterated.

Charges:

The articles are violative in the following respects:

21-119 R

Its labeling is false and misleading in that statements and representations therein, namely, books "Eat and Grow Younger" and "How to Make People Like You" and booklet "An Invitation to health the Easy Way" which when viewed in their entirety or through specific claims represent and suggest that it is difficult, if not impossible to obtain adequate nutrition from the diets of ordinary food due to the poor quality of soil in which grown; that growing and marketing practices and home preparation of meals results in practically everyone suffering from, or being in danger of suffering from, inadequate vitamin and mineral nutrition unless one takes a vitamin and mineral supplement; for a supplement to be nutritionally effective it should contain a minimum of 72 vitamins and minerals; that all ills or diseases of mankind are due to one or more vitamin or mineral deficiencies; that it furnishes all the ele-

ments necessary to insure good health, whereas the article would not be effective for treating or preventing these conditions.

21-129 R

Directions for use are inadequate for arthritis, loss of energy, blood disorders, palpatation of the heart, removing mucous, heavy thighs and upper arms, for localizing overweight, kidney stones, colds, sinus trouble, thyroid conditions, nervousness, night blindness and eye health, which are the diseases symptoms and conditions for which the article was held out during a series of lectures given by Lelord Kordel at the Masonic Temple and Fort Wayne Hotel, Detroit, Michigan during the period March 29, 1960 through April 8, 1960.

21-131 R

Directions for use are inadequate for bad breath, internal sweetening, intestinal fermentation, stomach ulcers, and removing of accumulations of mucous, which are the diseases symptoms and conditions for which the article was held out during a series of lectures given by Lelord Kordel at the Masonic Temple and Fort Wayne Hotel, Detroit, Michigan during the period March 29, 1960 through April 8, 1960.

21-132 R, 21-145/6 R

Its labeling, namely, leaflets entitled "Is this a new way to Strengthen Your Heart?", "Some interesting Testimonials from Enthusiastic Followers" and "Special Lecture Prices" and books entitled "Eat and Grow Younger" and "How to Make People Like You" is false and misleading in that they con-

tain statements which represent and suggest that the article is inadequate [sic] and effective treatment for preventing premature aging; and to strengthen the artery walls and aid in reducing high blood pressure; that it plays a big part in controlling the effect of brain fag by contributing to the health of the blood vessels of the brain and body; contributes to the health of the blood vessels in the brain and body, and aids in controlling brain fag, since the article would not be an effective treatment for these conditions and purposes.

Directions for use are inadequate for the treatment and prevention of air and food borne poisonings; impaired circulation; common colds, fatique [sic]; alcoholism; nose bleeding; blood-shot eyes; capilliary fragility; loose teeth; sneezing; pyorrhea; to prevent old age; hold cells together; neutralize the effects of cigarettes smoke and impure air; prevent blood vessels and capillaries from bursting; prevent cells within the retina from breaking down; improve the condition of the blood vessels, help blood circulation; neutralize the toxins in aspirin tablets; which are the diseases symptoms and conditions for which the article was held out during a series of lectures given by Lelord Kordel at the Masonic Temple and Fort Wayne Hotel, Detroit, Michigan during the period March 29, 1960 through April 8, 1960.

21-133 R, 21-144 R

Its labeling, namely, the leaflet and books previously enumerated under 21-132 R and 21-145/6 R, is false and misleading in that it contains statements which represent and suggest that the article is an adequate and effective treatment for hardening of the arteries;

defatting the arteries; liver and kidney troubles; heart attack; stroke; hemorrhage of the heart or liver; alcoholism; varicose veins; pains and cramps of varicose veins; old age; gall bladder diseases; and lowering of blood cholesterol; since the article is not an adequate and effective treatment for such conditions and purposes.

Its labeling does not contain adequate directions for use for the treatment in prevention of varicose veins; poor circulation; cholesterol and fatty deposits in the arteries; abnormal arteries; hardening of the arteries; degeneration of the liver; gall bladder diseases; cirrhosis of the liver; overweight and underweight; high blood pressure; arteriosclerosis; fibroid tumors of the uterus; spots on the liver; brown pigmentation spots on the skin; prostate gland trouble; which are the diseases; symptoms and conditions for which the article was held out during a series of lectures given by Lelord Kordel at the Masonic Temple and Fort Wayne Hotel, Detroit, Michigan during the period March 29, 1960 through April 8, 1960.

21-134 R

Directions for use are inadequate for infections, reducing, tissue repair, normal blood supply and reducing; to promote growth, aid women to become pregnant and for enzyme production; which are the diseases symptoms and conditions for which the article was held out during a series of lectures given by Lelord Kordel at the Masonic Temple and Fort Wayne Hotel, Detroit, Michigan during the period March 29, 1960 through April 8, 1960.

Appendix A

21-136 R,
21-147 R

Its labeling is false and misleading in that the statements and representations in its labeling, namely, leaflets "Some Interesting Testimonials From Enthusiastic Followers" and "Special Lecture Prices" represent and suggest that the article is an adequate and effective treatment for drainage of inflamed and irritated eyes, and to enable one to discard eye glasses within 5 or 6 months after starting to take A-Ribo, since the article would not be an effective treatment for these conditions and purposes.

Directions for use are inadequate for eye conditions, stimulating the eyes, for eye strain, for the octive nerve, for colds, sinus trouble and night blindness, which are the diseases symptoms and conditions for which the article was held out during a series of lectures given by Lelord Kordel at the Masonic Temple and Fort Wayne Hotel, Detroit, Michigan during the period March 29, 1960 through April 8, 1960.

21-141 R

Its labeling is false and misleading in that statements and representations in the labeling, namely, books "How to Make People Like You" and "Eat And Grow Younger" when viewed in their entirety as well as through specific claims represent and suggest that the article is an adequate and effective treatment for burning up accumulated cholesterol deposits, or to prevent them, for added vitality, fights fatigue, increased personality and improved brain function, prevents nervousness, sexual decline,

brain fag, nervous exhaustion, headaches, impotence, sterility, and senility; for heart and blood vessels diseases, anemia, rheumatic carditis, diseases of the liver and kidney disorders, for shattered nerves, depleted brain power, and wanning activity of vital glands, since the article would not be an adequate and effective treatment for these conditions and purposes.

21-141 R

Directions for use are inadequate for burning up accumulations of fat clogging blood vessels, varicose veins, prostate difficulties, hardening of the arteries, poor circulation, nervousness, preventing fatigue, mental alertness, hormone production, skin pigments and constipation, which are the diseases symptoms and conditions for which the article was held out during a series of lectures given by Lelord Kordel at the Masonic Temple and Fort Wayne Hotel, Detroit, Michigan during the period March 29, 1960 through April 8, 1960.

All Nos.

Its l a b e l i n g, namely, books "Eat and Grow Younger" and "How to Make People Like You" and booklet "An Invitation to Health The Easy Way" is false and misleading in that it contains statements which represent and suggest that nearly everyone in this country is suffering from malnutrition or in danger of such suffering because of demineralized, eroded and depleted soils, and by the refining, improper processing, and storage of foods; that the diet should be forfeited with additional quantities of minerals and vitamins are in excess

of amounts recommended for adequate nutrition, will provide additional benefits to persons in good health, and will assist in returning a sick or injured person, or one convalescing from an operation to good health; that the body has a greatly increased need for vitamins and minerals when the individual is under mental stress, tension, or strain, is physically fatigued, or is suffering from injury, infection, or illness, or is undergoing surgery, and which increased need is an indication for the use of excess quantities of vitamins and minerals offered by the products, since these statements are contrary to fact.

GRF/mmj
1/20/61

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

FOOD AND DRUG ADMINISTRATION

INFORMATION SHEET IN CONNECTION WITH ENCLOSED NOTICE OF HEARING

OBJECT OF THE HEARING

This hearing is scheduled to give the person or persons who appear to be responsible for the violations of the Federal Food, Drug, and Cosmetic Act as specified in the attached Charge Sheet an opportunity to explain *voluntarily* any circumstances connected with the preparation, handling, shipment, or sale of the articles involved which

would indicate that criminal action should not be taken. Any civil action which may have been taken against the goods involved, such as seizure, does not preclude prosecution of those responsible for the violation; the hearing concerns the possible criminal action only. A copy of the Federal Food, Drug, and Cosmetic Act and regulations for its enforcement may be had upon request.

NATURE OF THE HEARING

This hearing is informal and confined to questions of fact. For your convenience in submitting required information concerning the status of your firm both on the date of response to this notice and on the date of alleged violation, the attached Legal Status forms should be filled out and returned with your answer. Your answer may consist of the disclosure of any pertinent facts, letters, files, guaranties, shipping documents, analyses, arguments, etc., which you feel may present valid reasons why you should not be prosecuted.

GUARANTIES [sic]

In the case of articles that are adulterated or misbranded when introduced in interstate commerce the Federal Food, Drug, and Cosmetic Act places responsibility on the interstate shipper, even though he may be only the distributor and not the manufacturer. Distributors may relieve themselves of responsibility if they hold a legal guaranty under Section 303 (c) of the act. If the articles were sold to you by a person residing in the United States and guaranteed by such person to comply with the provisions of the act, you should submit—

Evidence of that fact, and

A statement as to whether the product at the time of the apparent violation by you was in the

identical condition and bore the same labels as when received by you from the guarantor, and

The full name of the person who, if called upon, can identify pertinent records and testify to the facts as you represent them.

How to Answer

You may appear in person or by attorney or other designated representative, or you may submit your response in the form of a letter in lieu of personal appearance. If written response is made, please submit your letter and all accompanying documents in *triplicate.* Documents submitted at personal appearance should also be in *triplicate. All documents should be conspicuously identified by the reference number shown on the upper right corner of the Notice of Hearing.*

Result of the Hearing

After the hearing has been held and all the facts considered, if it is the conclusion of the Secretary of the Department of Health, Education, and Welfare that prosecution should be recommended, the facts in the matter will be transmitted to the Department of Justice for appropriate action.

Appendix A

NOTICE OF HEARING

DEPARTMENT OF

HEALTH, EDUCATION, AND WELFARE
FOOD AND DRUG ADMINISTRATION

In reply refer to
32-363/66 R et al

cc: Mr. Lelord Kordel with cpy
Charge Sheet & Information Sheet

April 19, 1961

Vital Foods, Inc.
22200 Grand River Ave.
Detroit, 19, Michigan
and Mr. Lelord Kordel

Investigation by this Administration indicates that violation of the Federal Food, Drug, and Cosmetic Act has occurred, as shown in the attached charges, with respect to the following:

> Fifteen consignments of products identified on pages 2 and 3 attached.

The facts in our possession indicate your responsibility for the violation. An opportunity will be given you on Thursday, April 27, 1961, at 2 PM. in Room 1200, 201 Varick Street, New York 14, NY, to present informally your views with respect to the charges before a decision is reached as to whether the matter should be referred to the Department of Justice for prosecution. You may appear in person or by attorney, or you may submit your response to this notice in the form of a letter in lieu of

personal appearance. If written response is made, please submit your letter and all accompanying documents in triplicate. Documents submitted at personal appearance should be in triplicate. If no response is received on (or before) the date of the hearing, the matter will be decided on the evidence at hand.

By direction of the Secretary of the Department of Health, Education, and Welfare:

F. K. KILLINGSWORTH
F. K. Killingsworth
Deputy Director of District.

Enclosures

Legal Status Form
Charge Sheet
Information Sheet

MEB

(Important: Note All Enclosures Carefully)

Appendix A

NOTICE OF HEARING

DEPARTMENT OF

HEALTH, EDUCATION, AND WELFARE

FOOD AND DRUG ADMINISTRATION

In reply refer to
32-375 R et al

April 19, 1961

Mr. Alfred Feldten
c/o Vital Foods Inc.
22200 Grand River Ave.
Detroit 19, Michigan

Investigation by this Administration indicates that violation of the Federal Food, Drug, and Cosmetic Act has occurred, as shown in the attached charges, with respect to the following:

Consignment of an article labeled in part: "Lelord Kordel's Vitamins. Minerals Nutri-Time A Dietary Food Supplement 90 Tablets * * * "shipped by Detroit Vital Foods, 22200 Grand River, Detroit, Michigan, to Peter J. Colucio, 303 Van Saun Drive, River Edge, NJ, on Mar. 23, 1960 (32-375 R).

Consignment of an article labeled in part: "Lelord Kordel's 100% Natural and Organic Super Protein Aminex * * * 100 Wafers * * *", shipped by Detroit Vital Foods, 22200 Grand River, Detroit, Mich., to Peter J. Colucio, 303 Van Saun Dr., River Edge, NJ, on or about Mar. 23, 1960. (32-377 R).

Consignment of an article labeled in part: "Lelord Kordel's 'Frutex' Fruit Salad Natural Organic Vitamin C 30 Wafers * * *", Detroit Vital Foods, 22200 Grand River, Detroit, Mich., to Peter J. Colucio, 303 Van Saun

Appendix A

Drive, River Edge, NJ, on or about Mar. 23, 1960. (32-376 R).

The facts in our possession indicate your responsibility for the violation. An opportunity will be given you on Thursday, April 27, 1961, at 2 PM, in Room 1200, 201 Varick St., New York 14, NY, to present informally your views with respect to the charges before a decision is reached as to whether the matter should be referred to the Department of Justice for prosecution. You may appear in person or by attorney, or you may submit your response to this notice in the form of a letter in lieu of personal appearance. If written response is made, please submit your letter and all accompanying documents in triplicate. Documents submitted at personal appearance should be in triplicate. If no response is received on (or before) the date of the hearing, the matter will be decided on the evidence at hand.

By direction of the Secretary of the Department of Health, Education, and Welfare:

F. K. KILLINGSWORTH
F. K. Killingsworth
Deputy Director of District.

Enclosures

Legal Status Form
Charge Sheet
Information Sheet

MEB

(Important: Note All Enclosures Carefully)

Appendix A

CHARGE SHEET

32-375 R, Nutritime
32-377 R, Aminex
32-376 R, Frutex

Prohibited Act:

Section 301(a) of the Federal Food, Drug, and Cosmetic Act. The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

The articles are violative in the following respects:

(32-375 R)

The product Nutritime is misbranded because its label fails to bear adequate directions for use for brittle bones, rickets in children, nerve and muscle health, eye health, anemia, poor mentality, insomnia, general weakness, impaired respiration, constipation, weak kidneys, female disorders, goiter, insanity nervousness, tonsillitis and overweight; aids in maintaining normal heart health, warmth, vitality, magnetism and stamnia; controls clotting of the blood and for many other conditions and diseases, for which diseases and conditions it was recommended orally by Mr. Kordell in his lectures in New York from March 7 through March 17, 1960. Nutritime is further misbranded under 502(a) by labeling accompanying said article, namely, books, "Live to Enjoy the Money you Make", "Eat Your Troubles Away", "Eat and Grow Younger", and "Health Through Nutrition" when viewed in their entirety and through specific claims, and in the setting in which they are employed represent and sug-

gest that the article is an adequate and effective treatment for and prevention of practically all diseases and ailments of mankind, including, but not limited to heart diseases, high blood pressure, hardening of the arteries, combatting infections, prevents bones from softening, insomnia, helps in toning up blood vessels; for adrenal glands, poor circulation, arthritis, fever and aches and pains accompanying fever, sore throat, earache, pharyngitis, swollen neck glands, pneumonia and acute rheumatism, ulcers of the stomach, kidney disorders, chronic fatigue, overcoming sexual weaknesses; for controlling diabetic gangrene, fatigue, irritability, nervous exhaustion and brainfag; for speeding up the healing of wounds after surgery, poor posture and constipation, which statements are false and misleading since the article is not adequate and effective for such purposes.

(32-377 R)

Aminex is misbranded because its label does not bear adequate directions for use for helping to form antibodies, for fighting infections, for aiding digestion, for muscle building after middle age for which diseases and conditions it was recommended orally by Mr. Kordel in his lectures in New York from March 7 through March 17, 1960.

(32-376 R)

Frutex is misbranded because its label does not bear adequate directions for use for neutralizing the results of toxins in tainted foods and impure air; for overcoming toxins due to spray residues; for

fever, and aches and pains of fevers; maintaining characteristics of youth; for forming intercellular substances in bones, teeth, arteries and capillaries; for preventing common colds, fatigue, alcoholism and infections; for overcoming brittleness and fragility of blood vessels and capillaries and as an aid in the healing of wounds, for which diseases and conditions it was recommended orally by Mr. Kordel in his lectures in New York from March 7 through March 17, 1960.

The article (Frutex) is misbranded under 402(a) in that its labeling, leaflet entitled "Special Lecture Prices" accompanying the article, contains a vignette depicting natural ripe fruit, the statement "made with 16 fruits" and listing of ingredients represent and suggest that the article is made from fresh fruits, which is false and misleading since the article is not made from fresh fruits.

The article is further misbranded under 403(a) in that the label statement "Fruit Salad" with the listing of ingredients on the label and the inclusion in the composition of the article of the ingredients acerola berry, apple, lemon, orange, apricot, peach, date, fig, grapefruit and prune powders, which represent and suggest that the article would supply to the diet the nutritive factors in a serving of the ingredients in their fresh state, is false and misleading, since the designated amount of the article to be consumed would not provide the nutritional factors supplied by a serving of such ingredients in their fresh state.

Frutex is further misbranded under 403(a) in that the statements "natural organic vitamin c" con-

tained in label and in the labeling, to wit, the leaflet entitled "Special Lecture Prices" which accompanies the article, represent and suggest that the Vitamin C content of the article is natural organic vitamin C and is derived solely from the fruit ingredients contained in the article; which representations and suggestions are false and misleading, since all the vitamin C in the article is not natural organic Vitamin C and is not derived solely from the fruit ingredient in the article.

Frutex is further misbranded under 403(a) in that label statement "Rose Hips Vitamin C" represents and suggests that the article contains substantial quantities of vitamin C derived from Rose Hips, which representation and suggestion is false and misleading since the article contains little or no vitamin C from Rose Hips.

(32-376 R)

Frutex is misbranded under 502(a) in that its labeling, namely, the leaflet "Special Lecture Prices" and the books entitled "Eat and Grow Younger", "Eat Your Troubles Away", "How to make People Like You", "Live to Enjoy the Money You Make", and "Health Through Nutrition," accompanying said article, contains statements which represent and suggest that the article is an adequate and effective treatment for preventing premature aging, and to strengthen the artery walls and aid in reducing high blood pressure; for the development of women's breasts; for stomach ulcers; for the treatment of gall bladder sufferers; for preventing

sore throat, earache, pharyngitis, swollen neck glands; pneumonia and acute rheumatism; for preventing and treating epidemic dysentary, hematura, and hay fever; for increasing physical endurance, lessen fatigue, and combats the effect of heat; that it is a detoxifying agent and tissue mender; that it plays a big part in controlling the effects of brain fag by contributing to the health of the blood vessels of the brain and body; helps prevent profuse menstruation and menstrual pain; reduces the death rate from typhoid fever; and prevents and controls colds, chills, fever, polio and influenza; which statements are false and misleading since the article is not an adequate and effective treatment for such conditions and purposes.

FKK:MEB

Appendix A

NOTICE OF HEARING

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
FOOD AND DRUG ADMINISTRATION
1560 E. Jefferson Ave., Det. 7, Mich.

In reply refer to

Sample Number
20-114 R, 20-119 R

September 25, 1961

Detroit Vital Foods, Inc.,
Lelord Kordel
Alfred J. Feldten
20731 W. 7 Mile Rd.
Detroit, Michigan

Gentlemen:

Investigation by this Administration indicates your responsibility for violation of the Federal Food, Drug, and Cosmetic Act, as described in the attached Charge Sheet, with respect to the following:

(20-114 R)

> "Mich. Brand Korleen Tablets 60 tablets $3.00 Lelord Kodel of Michigan—Detroit, shipped by Freshman Vitamin Co., Oak Park, Mich. and in the possession of Lelord Kordel, Detroit, Michigan on April 5, 1961—The article was manufactured from active raw ingredients shipped in interstate commerce.

Appendix A

20-119 R

"Lelord Kordel's Frutex Vitamin C in a Natural Organic Base Nutrition Enterprises Distributors Chicago", shipped by Savoy Drug and Chemical Co., Chicago, Ill., and in the possession of Lelord Kordel, Detroit, Michigan on April 10, 1961.

An informal hearing will be held on Tuesday, October 10, 1961, at 2:00 p. m. (EST) at 1560 E. Jefferson Ave., Detroit 7, Michigan. to give you an opportunity to present your views in the matter. The enclosed Information Sheet explains the purpose and nature of the hearing, and how you may reply. If no response is received on or before the date set, our decision on whether to refer the matter to the Department of Justice for prosecution will be based on the evidence at hand.

By direction of the Secretary of the Department of Health, Education, and Welfare:

GEO. T. DAUGHTERS
Geo. T. Daughters
Chief of District

Enclosures

Legal Status Sheet
Charge Sheet
Information Sheet

(Important: Note All Enclosures Carefully)

cc: Lelord Kordel, & Alfred J. Feldten, w/cc Charge Sheet & Info. Sheet 3cc: Ad w/Orig & 2 cc Charge Sheet

Appendix A

CHARGE SHEET

Sample Number 20-114R-Korleen
20-119R-Frutex

Prohibited Act:

Section 301(k) of the Federal Food, Drug, and Cosmetic Act. The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being misbranded or adulterated.

Charges:

The articles are violative in the following respects:

(20-114 R)

Directions for use are inadequate for improved circulation, varicose veins, heart ailments, high blood cholesterol, circulatory disorders, high blood pressure disturbances, as an aid to burning up fatty accumulations and helping to rid body of old fats, brown spots of the skin (liver spots), improve function of the glands of pigmentation; which are the diseases, symptoms and conditions for which the article was held out during a series of lectures given by Lelord Kordel at the Masonic Temple and Fort Wayne Hotel, Detroit, Michigan. During the period April 4 through April 14, 1961.

(20-119 R)

Directions for use are inadequate for soft receding and bleeding gums, as a fighter and neutralizer of toxins, to results of stress, bleeding gums, as an essential substance in

Appendix A

the development of tissues from protein, mild scurvey, capilliary fragility, nosebleeds, for strengthening walls of blood vessels, as an aid in cementing body cells together, as an aid to resisting infection, as an aid in maintaining the characteristics of youth, enlarged tonsils, skin itch, white spots on the fingernails; which are the diseases, symptoms and conditions for which the article was held out during a series of lectures given by Lelord Kordel at the Masonic Temple and Fort Wayne Hotel, Detroit, Michigan during the period April 4 through April 14, 1961.

GRF/mmj
9/25/61